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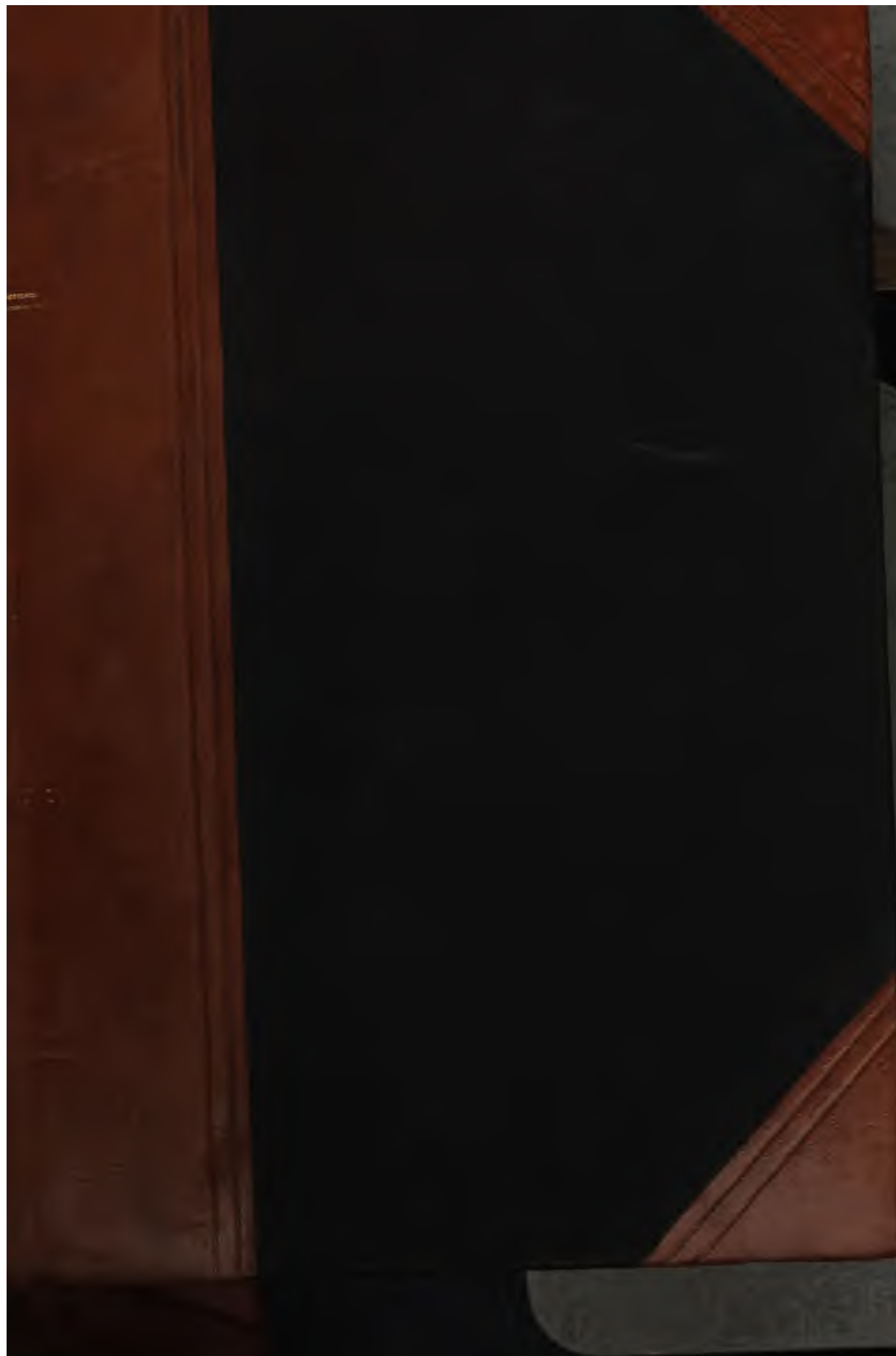
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THE  
CALCUTTA  
LAW REPORTS  
OF  
CASES  
DECIDED BY THE  
HIGH COURT, CALCUTTA,  
ALSO  
JUDGMENTS OF H. M.'S PRIVY COUNCIL.

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EDITED BY  
G. S. HENDERSON,  
*OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.*

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The Hon. SIR RICHARD GARTH, *Knight*, *Chief Justice.*

„ „ LOUIS STEUART JACKSON, C.I.E.,	}	<i>Judges.</i>
„ „ CHARLES PONTIFEX,		
„ „ WILLIAM AINSLIE,		
„ „ GEORGE GORDON MORRIS,		
„ „ JAMES SEWELL WHITE,		
„ „ ROMESH CHUNDER MITTER,		
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„ „ LOFTUS RICHARD TOTTENHAM,		
„ „ ALEXANDER THOMAS MACLEAN,		
„ „ LEWIS PRICE DELVES BROUGHTON,	}	<i>Officiating as Judges.</i>
„ „ CHARLES DICKINSON FIELD, M.A., LL.D.,		

The Hon. HENRY STEWART CUNNINGHAM was absent on deputation from the 11th May 1878.

The Hon. LEWIS PRICE DELVES BROUGHTON officiated as a Judge from the 11th May 1878.

The Hon. WILLIAM AINSLIE was absent on leave from the 20th October 1879, and retired from the Bench on the 1st June 1880.

The Hon. ALEXANDER THOMAS MACLEAN officiated as a Judge from the 17th November 1879, to the 1st June 1880, when he was appointed a Judge of the High Court.

The Hon. LEWIS STEWART JACKSON, C.I.E., retired from the Bench  
on the 22nd June 1880.

The Hon. CHARLES DICKINSON FIELD, M.A., LL.D, officiated as a  
Judge from the 22nd June 1880.

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The Hon. GREGORY CHARLES PAUL, C.I.E. ... *Advocate-General.*

JOHN D. BELL, Esq. ... *Standing Counsel.*

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## ADDENDA AND CORRIGENDA.

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Page 69, after "had" in line 6 from bottom	...	... insert "not."
" 120, for "sue" in line 13 from bottom	...	... read "defend."
" 140 ,, "K's" in line 15 from bottom ...	...	... ,, "D's."
" 140 ,, "first" in line 9 from bottom ...	...	... ,, "point."
" 216 ,, "properties" in line 4 from top	...	... ,, "proprietors."
" 260 ,, "resumptions" in line 3 from bottom	...	... ,, "resumption suite."
" 345 ,, "Gocool" in lines 16 and 18 from bottom	...	... ,, "Gobind."
" 346 ,, "Gocool" in line 17 from bottom	...	... ,, "Gobind."
" 370 ,, "prior" in last line of head note	...	... ,, "subsequent."
" 444 , "irrelevant" in first line	... ..	... ,, "relevant."

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1842/

CALCUTTA  
HIGH COURT REPORTS,  
ORIGINAL, APPELLATE, AND REVISIONAL.

[ORIGINAL CIVIL JURISDICTION.]

RAMPERSAD . . . . . PLAINTIFF;

1880  
Feb. 11th.

AND

JUGGERNAUTH AND OTHERS . . . . . DEFENDANTS.

*Arbitration—Act VIII of 1859, sections 315, 318 and 319—Arbitrator,  
Appointment of sole, in place of four—Reference, Recall of—Consent.*

In a suit for a partnership account the matters in dispute were, by an order dated the 19th April 1877, referred by consent to four persons and an umpire, the award to be made within 5 months. Some steps were taken in the reference, but the arbitrators failed to make their award within the time limited, and meanwhile the umpire died. After negotiations for appointment of a fresh arbitrator and enlargement of the time had failed, the plaintiff moved that "the order of the 19th April 1877, might be recalled, and that the matters in dispute might be referred to the arbitration of such person or persons as the Court might be pleased to admit, or be tried and determined by the Court."

The defendant opposed the application. An order was, however, made on the 29th May 1878 that the order of the 19th April 1877 should be recalled, and that all matters in difference between the parties should be referred to C. D., who should make his award in writing within three months, or within such further time as the said C. D. might think necessary. Certain provisions as to the payment of costs were also made.

*Held*, that the order of the 19th May was not an order recalling the reference under section 318, and then referring it afresh under section 319 of Act VIII of 1859, but an order under section 319 appointing

1880  
 RAMPERSAD  
 v.  
 JUGGER-  
 NAUTH.  
 —  
*Statement.*  
 —

a new arbitrator in the place of the old ones, for which the consent of all parties was not necessary.

Under section 319 of Act VIII of 1859, the Court has power to appoint an arbitrator or arbitrators either in the place of an arbitrator or in the place of arbitrators.

**T**HE plaintiff in this suit, which was for a partnership account, moved for judgment upon an award. The defendants opposed the motion and applied to have the award set aside.

The circumstances were these:—On the 19th April 1877, an order was made by consent, referring the matters in difference between the plaintiff and the defendants to four persons—Mirzamull Bhurtea, Gourey Dutt Augurwallah, Gopeeram Tapriah and Balmokund Jollan—who were to make their award within five months, with Khan Chund Daga as umpire, who was to make his umpirage within a month after reference to him.

Some steps were taken in the reference, but down to March 1878 no award had been made. The time limited for making an award had then long since elapsed, and the umpire had in the meantime died.

On the 22nd March 1878 the plaintiff's attorney wrote to the arbitrators:—"You were directed to file your award within five months. I find you have not up to this time filed your award. I beg you will be pleased to let me know in detail by Monday next, without fail, what progress you have made with the reference and when your award will be ready, so that I may know what course to adopt."

Two of the arbitrators, Gopeeram Tapriah and Balmokund Jollan answered on the 25th March:—"The books of account which the parties handed to us have not been brought up yet. The time allowed to us by Court has expired, and the umpire Khan Chund Daga named in the order has died. If you allow us time for a further period of six months and another person be named as an umpire, we can arbitrate in the matter, otherwise we must withdraw from the arbitration."

The other two arbitrators, Mirzamull Bhurtea and Gourey Dutt Augurwallah, answered on the 28th March:—"The order which we have received from the Court in the above suit is already expired for the present. If the Court further ordered

as then the accounts which are ready we can see and pass our judgment before the parties.

On the 3rd April plaintiff's attorney replied to both these letters. To Gopeeram Tapriah and Balmokund Jollan he wrote:—"My client cannot allow you and the other arbitrators more than a month to make your award. Are you prepared to do so? As regards an umpire, we can have another man appointed." To the other arbitrators he wrote:—"Kindly let me know by to-morrow if you and your co-arbitrators are prepared to make your award in a month more, for my client cannot allow any further time than a month."

On the same day, the 3rd April, the plaintiff's attorney wrote to the defendant's attorney:—"The time for the arbitrators to make their award in this suit having expired, and no awards having been filed by them as yet, my client will be obliged to apply to the Court to have the arbitration recalled, unless the arbitrators file their award in a month more, the utmost time that my client can allow them. If you agree to this, an order for that purpose must be obtained at once."

The answer to that was on the 6th April:—"The award cannot possibly be made within a month. The suit had, therefore, better be brought back into the board."

On the 26th April the plaintiff's attorney wrote to the defendant's attorneys:—"I would suggest that Mr. Davis, the Chief Clerk of the Court, should be appointed the sole arbitrator. In that case no umpire is at all necessary. Will your client consent to this proposition? If not, I shall have to make an application to the Court on the matter."

The answer is on the 30th April:—"Our client declines to refer the matter to Mr. Davis. He is quite willing that the suit should, as previously suggested by you, be restored to the board for hearing."

On the 2nd May, the plaintiff's attorney wrote to the arbitrators inquiring what had taken place before them, and asking for their notes.

On the 4th May, Mirzamull Bhurtea and Gourey Dutt Augurwallah wrote in reply, stating certain proceedings which had taken place before them, and they proceed:—"On receiving

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your second notice we held a meeting in which we proposed to the defendant's arbitrators to proceed on reference. But they declined to do so, until the whole of the accounts were brought up, and no proposition was made how to accelerate the closing up of the books. We, therefore, see that as the arbitrators on behalf of the defendants are taking a different view in this, and would not agree, we have no objection to the case being restored on the board of causes." On the 22nd May 1878, the plaintiff gave notice of motion for an order, that "the reference mentioned in the order made on the 19th April 1877, may be recalled, and that the matters in dispute between the parties may be referred to the arbitration of such person or persons as the Court will be pleased to nominate, or be tried and determined by the Court."

The plaintiff moved accordingly, and the defendant opposed the motion.

On the 29th May 1878, an order was made as follows :—

"It is ordered that the said order of reference, dated the nineteenth day of April one thousand eight hundred and seventy-seven, be recalled, and that Mirzamull Bhurtea, Gourey Dutt Augurwallah, Gopeeram Tapriah, and Balmokund Jollan, the arbitrators appointed by the said order of reference, do deliver over all books in their possession, relating to the said reference to the arbitrator hereinafter appointed. And it is further ordered that all matters in difference between the parties to this suit from the Sumbut year, 1921 to 1930, be referred to the final decision of Charles Thomas Davis, Esq., the Chief Clerk of this Court, who is to make his award in writing, and submit the same to this Court, together with the proceedings, depositions and exhibits in this suit within three months from the date hereof, or within such further time as the said arbitrator may allow himself by endorsement on a copy of this order: And it is further ordered that the question of the costs of this suit, and of the reference directed by the said order, dated the 19th April 1877, including the costs and charges of the former arbitrators appointed under that order, together with the costs of the award to be made hereunder and of obtaining judgment thereon, including the costs and charges of the said new arbitrator, be in

the discretion of the said arbitrator: And it is further ordered that the said arbitrator be at liberty to examine the parties to this suit and their witnesses upon oath or affirmation which he is hereby empowered to administer: And it is further ordered that the said arbitrator shall have all such powers or authorities as are vested in arbitrators under Act X of 1877: And it is further ordered that the costs of and incidental to this application be costs in the cause."

The case was four months before the arbitrator so appointed: His award was made, and was filed in Court on the 10th July 1879.

*Phillips*, and *T. A. Apar*, for the Defendants.

*Branson* and *Bonnerjee*, for the Plaintiff.

*Phillips*.—The first arbitration having been recalled by the order of 29th May, the Court had again seisin of the case, and no second reference could then be made by the Court without the consent of the parties—see Act VIII of 1859, Chap. VI. The order made by Mr. Justice PONTIFEX was, therefore, without jurisdiction, the reference directed thereunder being an entirely new reference granting extended powers as to costs and extension of time to the new arbitrator.

Section 319 of the old Code, which deals with the power of the Court in certain cases to substitute new arbitrators, has no application here; for the former reference having been recalled there was in fact no substitution made. If it be held that there was a substitution, then I contend that in no case could the Court substitute one arbitrator in place of four arbitrators and an umpire, for it will be observed that the words of the section are distributive.

The Court has power to recall a reference if it is likely to be futile—*Joseph vs. Seerker*, Bourke's Rep., 359. So much of the order here as did recall the reference we do not dispute.

It nowhere appears that the original arbitrators have become incapable of acting.

The case of *Sheonath vs. Ramnath*, 10 Moore's I. A., 413, which is a reference to an original reference, does not affect the present application.

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[Russel on Awards, p. 716, was also referred to.]

*Branson*.—The arbitrators had refused to act, or become incapable of acting, and therefore, under section 319, the Court had power to appoint any number of arbitrators in their place. The words of the section are not distributive, otherwise the words would have been “in place or places.”

There has been acquiescence by the defendants and they cannot now turn round. The absence of jurisdiction had been waived. It appears, too, that the order referring the matter to the new arbitrator drawn up was approved by them.

*Bonnerjee* followed on the same side.

*Phillips*, in reply.—The absence of jurisdiction in the Court to make the order for the fresh reference could not be waived.

When the order was made it was objected that there was no jurisdiction, and in attending under compulsion we cannot be taken to have consented to the new reference.

[*WILSON, J.*—You may have objected to the order appointing the arbitrator, but in going before the arbitrator without protesting you seem to have acquiesced in the arbitration going on.]

There being a paramount order of the Court in force, to have protested would have been useless. A waiver must be with an intention to waive—mere silence under the circumstances was no evidence of consent. There must be distinct evidence of waiver—See *re Salkeld*, 12 Ad. and El., 767; *Earl of Darnley vs. London and Chatham and Dover Railway*, L. R. 2 E. and I. App. 43 (see p. 53); *Hewlett vs. Laycock*, 2 C. and P., 574; *Bignall vs. Gale*, 2 M. and Gr., 830.

In *Matson vs. Trower*, 1. Ry. and Mood., 17, the appointment of an umpire was held to have been acquiesced in by the parties appearing before him and allowing themselves to be examined, but there had been no original objection.

[*PONTIFEX, J.*—That case is similar to the present, for according to your contention there was no jurisdiction to appoint an umpire.]

If what had occurred before the arbitrators had been without any objection originally made, I do not say we might now have made this application.

In *Davies vs. Price*, 34 L. J., Q. B., 8, there was consent.

In *Ringland vs. Lowndes*, 17 C. B. R. S., 514, it was held that a party who attended before an arbitrator under protest, but cross-examined his adversary's witnesses and called witnesses in his own behalf, was not thereby precluded from afterwards objecting that the arbitrator had proceeded without authority, but there it does not appear that, if the parties had abstained from attendance, they would have been seriously prejudiced.

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Our approval of the order amounted to nothing more than an admission that it was drawn up in accordance with the direction of the Court.

In *Oulton vs. Radcliffe*, L. R., 9 C. P., 189, an irregularity (in service of a writ) was held to have been cured, but ordinarily a nullity cannot be waived. By consent we might have given the arbitrator jurisdiction, but we could not waive the want of it.

(As to whether there was practically a new contract to refer to arbitration—*Russell vs. Thornton*, 6 H. and N., 140, and *Andrews vs. Elliott*, 5 El. and B., 502, were quoted. On the question of enlarging the time for the original reference—*Tyerman vs. Smith*, 6 E. and B. was referred to.)

Mr. Brauson asked leave of the Court to quote the following cases, but was not permitted to do so :—

*Sadasiva Pillai vs. Ramalinga Pillai*, L. R. 2 I. A., 219, (see p. 232); and *Hurriah Chunder Roy vs. Poorna Sunduree Debee*, 18 W. R., 86.

*Cur. ad. vult.*

The judgment of the Court, (1) which was as follows, was delivered by

WILSON, J. :—

WILSON, J.

The plaintiff in this case moved for judgment upon an award. The defendant moved that the award be set aside, and the case brought back into the list for hearing. The motions were heard together on the 10th and 24th January last. The point upon both motions is the same, whether the arbitrator had power to make an award. If he had, the plaintiff is entitled to judgment on the award. If he had not, the defendant is entitled to have

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the award treated as a nullity, and the case brought back into Court.

The suit, which was for a partnership account, was instituted on the 6th September 1876, and the case has to be dealt under the provisions of the Civil Procedure Code, 1859. [The learned Judge here stated the facts set out above and proceeded as follows:—]

It is contended for the defendant that the Court had no power to make this order. Before considering the defendants' objections in detail, it will be convenient to refer to the sections of the Act bearing upon the matter. They are as follows:—

"If the parties to a suit are desirous that the matters in difference between them in the suit, or any of such matters, shall be referred to the final decision of one or more arbitrator or arbitrators, they may apply to the Court at any time before final judgment for an order of reference."

"The arbitrator or arbitrators shall be nominated by the parties in such manner as may be agreed upon between them. If the parties cannot agree with respect to the nomination of the arbitrator or arbitrators, or if the person or persons nominated by them shall refuse to accept the arbitration, and the parties are desirous that the nomination shall be made by the Court, the Court shall appoint the arbitrator or arbitrators."

"The Court shall, by an order under its seal, refer to the arbitrator or arbitrators the matters in difference in the suit which he or they may be required to determine, and shall fix such time as it may think reasonable for the delivery of the award, and the time so fixed shall be specified in the order."

"When the arbitrator or arbitrators shall not have been able to complete the award the period specified in the order from the want of necessary evidence or information or other good and sufficient cause, the Court may from time to time enlarge the period for the delivery of the award, if it shall think proper. In any case in which an umpire shall have been appointed, it shall be lawful for him to enter on the reference in lieu of the arbitrators if they shall have allowed their time or their extended time to expire without making an award, or shall have delivered

to the Court or to the umpire a notice in writing stating that they cannot agree. Provided that an award shall not be liable to be set aside only by reason of its not having been completed within the period allowed by the Court, unless on proof that the delay in completing the award arose from corruption or misconduct of the arbitrator or arbitrators or umpire, or unless the award shall have been made after the issue of an order by the Court superseding the arbitration and recalling the suit."

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"If, in any case of reference to arbitration by an order of Court, the arbitrator or arbitrators or umpire shall die, or refuse or become incapable to act, it shall be lawful for the Court to appoint a new arbitrator or arbitrators or umpire, in the place of the person or persons so dying, or refusing or becoming incapable to act. Where the arbitrators are empowered by the terms of the order of reference to appoint an umpire and do not appoint an umpire, any of the parties may serve the arbitrators with a written notice to appoint an umpire; and if, within seven days after such notice shall have been served, no umpire be appointed, it shall be lawful for the Court, upon the application of the party having served such notice as aforesaid, and upon proof to its satisfaction of such notice having been served, to appoint an umpire. In any case of appointment under this section the arbitrator or arbitrators or umpire so appointed shall have the like power to act in the reference as if their name or names had been inserted in the original order of reference."

The defendant contends, in the first place, that the order of the 29th May must be read as an order recalling the case, under section 318, and then referring it afresh under section 315, and as an order under section 315 can only be made by consent, it is argued that the order was void. We do not think this a correct view of the order; the motion was in the alternative to refer to a fresh arbitrator or arbitrators or to bring the case back into Court. The order rejects the latter alternative, and adopts the former. It seems to us clear that the order is an order under section 319 appointing a new arbitrator in place of the old ones, and consent is not necessary for it under the last-mentioned section.

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It was next contended, though not very strenuously, that there was no proper enlargement of the time within which the new arbitrator was to make his award. There does not seem to us any foundation for this objection. The order fixes a future date by which the award is to be made. This is, we think, a good enlargement.

It was next contended that the condition under which a new appointment could be made under section 319 had not been fulfilled, for that the arbitrators, or at least some of them had not died, or refused, or become incapable to act.

Of the four arbitrators and the umpire, the umpire was dead. Two of the arbitrators, Gopiram Tapreah and Balmokund Jollan, by their letter of the 25th March, expressly resigned their office unless the parties consented to enlarge the time for six months—a condition which was immediately rejected. The other two arbitrators, Mirza Mull Bhurteah and Gourey Dutt Augurwallah, in their letter of the 28th March, plainly state that they can only continue to act if the parties obtain such an enlargement as was necessary; and the parties, being unable to agree as to enlargement, elected to make no application for any. The same two arbitrators in their letter of the 4th May explain that their disagreement with their colleagues is so complete that they can see no way of proceeding. Accordingly, “we have no objection to the case being restored on the board of causes.”

This letter was, we think, intended by them as a resignation of their positions as arbitrators; it appears to have been so understood by all parties at the time; and the grounds to which we have referred as supporting the conclusions were before the parties and before the Court when the order in question was made. This objection therefore fails.

The remaining objection raises a point of some general importance in cases still governed by the Code of 1859. It is contended that under section 319 the Court had no power to appoint one new arbitrator in the place of four; but, if it made any appointment at all, was bound to appoint one new arbitrator in place of each of the old ones, and a new umpire in the place of the deceased umpire.

The words of the section are, “If the arbitrator or arbi-

trators or umpire shall die or refuse or become incapable, it shall be lawful for the Court to appoint a new arbitrator or arbitrators or umpire in the place of the person or persons so dying or refusing or becoming incapable."

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It was said that these words should be read distributively, that they only authorise the substitution of an arbitrator for an arbitrator, of arbitrators for arbitrators, or of an umpire for an umpire.

Even if it were considered that this construction was the true one, it would not support the words contention to the full extent. It would only require arbitrators (not the same number of arbitrators) to succeed arbitrators.

Mr. Branson made a remark in his argument, which we think well founded, that if the construction contended for were intended the words ought to have been not "in the place," but "in the place or places." Nor would the construction contended for tend to give effect to the intentions of the parties themselves in this or in the great majority of cases. In most cases, as in this, the parties agree that, failing a decision by the arbitrators, a single umpire is to decide; showing that though they do attach importance to the persons they originally named, failing them, they do not attach importance to number. The construction contended for would further in many instances operate very oppressively upon the parties concerned. When a large number of arbitrators is appointed it is commonly because they are friends of the parties who are often willing to arbitrate gratuitously. But arbitrators appointed by the Court cannot be expected to act for nothing; and it would be a serious hardship to the parties if in every such case as the present the Court must compel them to pay the fees of four arbitrators when one is enough.

The natural meaning of the words seems to us to be that the Court may appoint an arbitrator or arbitrators either in the place of an arbitrator or in the place of arbitrators.

The addition of the word umpire raises an apparent difficulty; but it is not, we think, a real one. We cannot say that there may not be cases in which it might be right to appoint arbitrators instead of an umpire, or an umpire instead of arbitrators.



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This construction gives effect far more nearly to the expressed intention of the parties, in this and similar cases, than the other construction would do; and all considerations of convenience are in its favor.

All the objections to the order of the 29th May 1878 in our opinion fail.

As we consider that order to be good, it is unnecessary to express any opinion upon the further question, whether, supposing there was a defect in the arbitrators' appointments, the defendants had by their conduct waived the objection.

There will be a decree in terms of the award with costs of this motion, and the defendant's motion is dismissed with costs.

## [PRIVY COUNCIL.]

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RAJ BAHADOOR SING . . . . . APPELLANT ;

February 6th.

AND

ACHUMBIT LALL . . . . . RESPONDENT.

*Hindu Law—Recital—Admission—Widow, Enlargement of estate of—  
Limitation Act, IX of 1871, Sched. II, Art. 129—Adoption.*

D, a Hindu, being old and unable to manage the business of his estate which he held jointly with his brother, executed a deed whereby he agreed to pay a manager to take the business off his hands. In that deed he described his wife, who was a *purdanashin* lady, as being joined with him as owner of the estate.

*Held*, that there was no admission binding upon those claiming under D, and that the widow's estate was not enlarged to an absolute estate.

The provision in Act IX of 1871, Sched. II, whereby it is enacted that, with respect to suits to establish or set aside an adoption, the time when the period of limitation begins to run is "the date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father," does not interfere with the right, which but for it a plaintiff has, of bringing a suit to recover possession of real property within twelve years from the time when the right accrued.

**A**PPPEAL from a decision passed by a Divisional Bench of the High Court at Calcutta (GLOVER and MITTER, J.J.)

The facts are fully set forth in the judgment of their Lordships (1) of the Judicial Committee, which was as follows:—

In this case the respondent (the plaintiff), Achumbit Lall, brought his suit to recover possession of certain property to which he alleged that he was entitled as joint heir with his brother, one Doorga Prosad. The defendant Raj Bahadoor Sing, to whom was joined the brother of the plaintiff, claims under the widow of Doorga Prosad, and the real question in the cause is, whether, under a certain document called a waseeutnamah, executed by Doorga Prosad on the 24th May 1870, the widow's estate was enlarged from the ordinary estate of a Hindu widow to an absolute estate. The main contention in the Court below appears to have been that the document operated in the nature of a will, conferring upon her, or granting to her, an absolute estate; but the main contention before their Lordships has been somewhat different. It has not been seriously argued that the document conferred upon her or granted to her any estate which she had not before, but it is contended that it operates by its recitals as an admission, on the part of Doorga Prosad, by which a person claiming under him would be bound, that the widow had in fact a joint interest with Doorga Prosad in the property which is the subject of the waseeutnamah, a part of which is claimed in this suit.

The case was heard before the two Courts in India, both of whom found in favor of the plaintiff. The High Court was composed of Mr. Justice GLOVER, and a very learned native, Mr. Justice MITTER, and those learned Judges had the original document before them. They appear to have considered that the translation, which is now in the Record, was to some extent imperfect, and they gave their decision upon the construction which they put upon the original document. It would have been more satisfactory to their Lordships if they could have had before them the translation of the document on which the High Court relied, and they cannot help thinking that it was incumbent on the appellant who desires to satisfy them that the High Court was wrong, to furnish them with that translation, or at all events some information with reference to it. As it is, however, their Lordships

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must deal with the document which is before them. Undoubtedly it is somewhat ambiguous in many of its expressions, but they think it clear, as has been before observed, that there was no intention on the part of Doorga Prosad to grant any new estate to this lady; and they do not see their way to differ from the construction which was put upon it by the High Court, and which is expressed in these terms, in the judgment of Mr. Justice GLOVER, agreed to by Mr. Justice MITTER: "I take the meaning of Doorga Prosad to be, that feeling old and unable to manage the complicated affairs of a large estate, and knowing that his wife, a *purda nashin* lady, would likewise be incompetent to the business, he agrees to pay a manager to take all the trouble off their hands, and to do so at once. He speaks of his wife as being joined with him as owner, but these words cannot be taken literally, as throughout the document he speaks of himself as the sole proprietor, and all his arrangements are made with reference to his own comfort and advantage in the first instance; Jusoda Chowdhrahi is to get nothing till his death. The warning given to his other heirs refers to the time between his own death and Josoda's. That the lady herself did not understand the *waseeutnamah* to be a will giving her the property to dispose of after her death is clear from her own statement" in another suit. Their Lordships, on the whole, are not prepared to disagree with this view, which was taken by the learned Judges of the High Court, and this construction of the document disposes of the main point in the case.

It only remains to notice two subsidiary questions: The widow executed, on the 7th July 1851, a putnee lease in favour of Raj Bahadoor Singh, of two out of three of the mouzahs which are the subjects of this suit, and part of the prayer of the claim is, that that putnee lease be set aside. Inasmuch as it has been found as a fact by both Courts that there was no necessity for borrowing the sum for which the putnee was granted, it follows that if the widow had no more than a Hindu widow's estate the putnee could only bind her life interest. It appears that the lady also executed what has been called a deed of adoption on the 24th May 1860, by which she professed to adopt, in pursuance of the permission of her husband, who had died in 1825, the father of Raj

Bahadoor, to whom the putnee had been granted, and Chutturdhari Lal, the brother of the plaintiff and a defendant, and to make over to them her property. But the gift was not to take effect until her death, possession being retained by her during her lifetime. It has been admitted on the part of the appellants that this document cannot be seriously treated as an attempt on the part of the widow to adopt a son or sons as heirs to her husband, but is merely an adoption of heirs to herself, and in fact a disposition of her property, very much in the nature of a will, to them after her death. A part of the claim is, that this document also be cancelled. Upon this part of the case a question has been raised concerning the statute of limitations, and the schedule to the last statute of limitations of 1871 has been quoted, wherein it is enacted that, with respect to a suit to establish or set aside an adoption, the time when the period of limitation begins to run is "the date of the adoption or (at the opinion of the plaintiff) the date of the death of the adoptive father." On the above view of the document, the words of the statute would seem scarcely applicable to it. Their Lordships are clearly of opinion that this provision relating to adoption, though it might bar a suit brought only for the purpose of setting aside the adoption, does not interfere with the right which, but for it, a plaintiff had of bringing a suit to recover possession of real property within twelve years from the time when the right accrued, and that they regard as the nature of this suit. Inasmuch as according to the admitted construction of the document the widow conveyed by it no more than she had, which was but a life interest, the document is innocuous, and it is immaterial to the plaintiff whether it be set aside or not. Their Lordships, however, think it well to say that the decree of the Court below in setting aside this document and the putnee lease must be considered to have in effect decided no more than that the plaintiff was entitled to recover notwithstanding those documents, without in any degree compromising any rights which other parties may have under them.

Their Lordships will humbly advise Her Majesty that the judgment of the Court below should be affirmed, and this appeal dismissed with costs.

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## [CIVIL APPELLATE JURISDICTION.]

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No. 661 of  
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GUNGA NARAIN SIRCAR } (PLAINTIFFS) APPELLANTS ;  
AND ANOTHER . . . . . }  
AND  
SRINATH BANERJEE . . . (DEFENDANT) RESPONDENT.

*Co-sharers—Rent suit by one of several co-sharers.*

One of several co-sharers in a talook sued the tenant for a certain share of the rents for the years 1281, 1282, and 1283. It appeared that he had been in the habit of collecting his share separately, but that in former years he had claimed and collected a smaller share than he now claimed to be entitled to. The co-sharers were made defendants, but did not appear. The tenant defendant objected that he was not liable to pay any fractional share.

*Held*, that as the co-sharers, who were the only persons interested in disputing the amount claimed by the plaintiff, had not entered an appearance, it was not necessary to raise an issue or to give evidence as to the amount of that share, and that the plaintiff was entitled to a decree for the amount claimed.

**A**PPEAL from a decision passed by the Additional Judge of the 24-Pergunnahs, affirming a decree of the Moonsiff of Baripore.

The plaintiffs in this case sued to recover a 14 annas share in the rents of certain talooks for the years 1281, 1282 and 1283 from the principal defendant; the other defendants were the co-sharers with the plaintiffs.

It appeared from certain decrees filed in the suit, and from other evidence, that the plaintiffs had been in the habit of making separate collections of their own share, but it did not appear that they had ever collected as great a share as 14 annas. On the contrary, the decrees showed that in 1272 the share collected was 13 annas, in 1273, 11 annas, and in 1274, 13½ annas, while there was no evidence as to how this share had increased to 14 annas. The co-sharers did not appear in the suit, but the tenant defendant contended that he was not bound to pay for any fractional share.

The lower Courts held that it was incumbent upon the plaintiffs to prove that their share was really 14 annas, and as they had not done so, they dismissed their suit. The plaintiffs appealed to the High Court, on the ground that, inasmuch as the co-sharer defendants did not object to the amount of the share claimed, the lower Courts should have held that they were entitled to a decree for the full amount claimed.

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*Baboo Jogesh Chunder Roy*, for the Appellants.

*Baboo Bama Churn Banerjee*, for the Respondent.

The judgment of the High Court (1), which was as follows, was delivered by

JACKSON, J. :—

JACKSON, J.

Upon the precise question raised in this appeal, no previous ruling has been brought to our notice. The plaintiffs are some of several co-sharers who indeed owned much the larger portion of the estate. The defendant Srinath holds land under all the co-sharers, and he previously paid rent to the plaintiffs according to the shares which they from time to time claimed; but in the present suit they claimed a larger share than they appear to have received before, that is, they claimed 14 annas, whereas in previous years they obtained decrees for 13½ annas, for 11 annas 18 gundahs, and for 13¼ annas. In this state of the facts, the Judge observes :—"It still remains for the plaintiffs to prove that their share is 14 annas;" and further on :—"It seems to me, therefore, that the plaintiffs, having failed to prove that they have been collecting a specific 14 annas share of the rent before, cannot succeed in the present suit merely by reason of making certain other co-sharers defendants in the suit." The co-sharers, as stated by the Judge, are parties to the present suit, and they have not appeared at any stage of the litigation. It is contended now in support of this judgment that in the circumstances the plaintiffs are bound to sue for the whole rent, making the other co-sharers parties defendants. That course, however, is only

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laid down for cases where there has been no previous payment by shares, and where the plaintiff seeks for the first time to obtain a decree in respect of what is due to him, but in the present case there has been previous payments, and it appears to us that it was not necessary to take that course. Besides the co-sharers being the only persons interested in disputing the amount of the plaintiffs' share, have not entered appearance, and have not questioned the share which the plaintiffs claim. It seems to us, therefore, that there was no necessity for raising an issue as to the amount of that share, and the plaintiffs consequently were not bound to offer proof; because, as before observed, the only persons interested in raising that question having acquiesced in the plaintiffs' statement, and being bound by the decision, the tenant defendant ran no risk of being called upon to pay again any part of the share adjudged to the plaintiffs. It appears that the defendant had not been served with notice to pay rent as for the share of 14 annas. If, in these circumstances, the defendant simply answered that he had paid or was willing to pay, and now paid into Court the amount last recovered by the plaintiffs, which appears to have been 11 annas 18 gundahs 3 crants, the plaintiffs' suit might with some justice have been dismissed, or, at any rate, they would have a decree for no more than what would appear to be so payable. But he has not taken that course. He has not paid a single pice of the rent of the year. It appears to us, therefore, that the plaintiffs are entitled to a decree as for 14 annas share of this rent. As the plaintiffs have not given notice to pay 14 annas, we think there should be no costs. Each party will pay his own costs throughout.

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## [ORIGINAL CIVIL JURISDICTION.]

BHOYRUB CHUNDER ROY . . . . . PLAINTIFF;

1880.  
February 26th.

AND

MADHUB CHUNDER SEN . . . . . DEFENDANT.

*Civil Procedure Code (Act X of 1877), section 266—Pension—"Saleable property"—Attachment.*

In case of pensions not exempted from attachment under section 266 of the Civil Procedure Code (Act X of 1877), it is only arrears in respect thereof actually accrued due that are attachable in execution of a decree.

*Syud Tuffoozool Hossein Khan vs. Rughoonath Pershad*, 14 Moore's I. A., 40 (S. C.) 7 B. L. R., 186, cited and followed.

**T**HIS was an application for execution of a decree obtained by one Bhoyrub Chunder Roy against the defendant Madhub Chunder Sen by attachment and sale of a pension of Rs. 250 per mensem granted to the latter by the Bank of Bengal.

This pension, it appeared, had been granted by the Directors of the Bank under section 32 of Act XI of 1876, for good services rendered by the defendant as Kazanchi of the Bank, and was made payable for his natural life.

*Henderson*, for the Plaintiff, contended that inasmuch as this pension was granted in consideration of past services for the natural life of the judgment-debtor under general powers given to the Directors of the Bank by section 32 of Act XI of 1876, it must be taken to be irrevocable, and therefore saleable property over which the judgment-debtor had a disposing power under section 266 of the Civil Procedure Code. It was not included among the stipends and pensions exempted from attachment by section 266. In *Wells vs. Foster*, 8 M. and W., 1852, it was pointed out that a pension given entirely for past services might be assigned whether granted for life or during the measure of others, and the assignee acquired a good title both at law and equity.



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 Inverness  
 Commercial  
 Bank  
 v.  
 Macdonald  
 Commercial  
 Bank  
 v.  
 Macdonald.  
 1 and 7.

A pension granted under 15 and 16 Vict., c. 54, section 15, or as held in England to be liable to seizure under writs of sequestration in the case of *Willcock vs. Torrel*, L. R. 3 Ex. D., 323. In that case the Court made an order to restrain the debtor from receiving the pension. See *Macarthy vs. Gould*, 1 Ball and Beatty, 385; and *Lloyd vs. Eagle*, 5 Jur. N. S., 1 and 7.

The following judgment was delivered by

WILSON, J. WILSON, J. :—

I do not think I can make the order asked for in this case. There are several difficulties in the way. In the first place in order that the plaintiff should be entitled to the attachment asked for, it must be shown that this pension is property falling under section 266 of the Code of Civil Procedure. Now the only words of that section under which it could possibly come are the words "other saleable property." I take it that saleable property means property which, if sold, would pass to the purchaser. Before coming to the conclusion that this pension is saleable property, I should require more information than is furnished by the affidavits before me.

No doubt the Directors of the Bank have power to grant pensions, but it would be necessary to know the precise terms of the grant in order to see whether a particular pension falls under the words of the section. Upon the affidavits before me I cannot tell whether this is an irrevocable pension such that a third person, purchasing it, could enforce the payment of it against the Bank.

If that were the only difficulty in the way I might require further affidavits before making any order; but I think there is another insuperable objection, for it is clear, I think, that in any case it is only arrears of pension actually due that are attachable. The Privy Council have laid down a rule to this effect in the case of *Syud Tuffoozool Hossein Khan vs. Rughoonath Pershad*, 14 Moore's I. A., 40. That is the rule which was acted on under Act VIII of 1859, and I see nothing in the new Code to introduce a different rule.

In one respect the Legislature has amended the law on this subject as laid down in Act VIII of 1859, for, while exempting from attachment "stipends allowed to Military and Civil Officers " and Civil pensioners of Government and political pensions," and one moiety of the salary of a public officer or of the servant of a Railway Company," the legislature, in section 266 of the present, as amended by the recent amending Act, allows the other half to be attached in advance; but this provision is limited to particular pensions which do not include the pension before us.

Therefore, assuming the pension in the present case to be one which the Bank is compellable to pay to a purchaser at a sale in execution, there is nothing to alter the rule that only arrears accrued due can be attached. No order, therefore, will be made on this application.

1880

## [PRIVY COUNCIL.]

BIJAI BAHADOOR SINGH . . . . . APPELLANT;

AND

BHYRON BUX SINGH . . . . . RESPONDENT.

1879  
July 19th.*Pottah of property mortgaged to grantor—Confirmatory grant.*

In 1846, A granted a pottah of a certain village, which had been mortgaged to him, to his illegitimate son B, promising, in the event of the mortgagor redeeming the estate, to make over to B in lieu of the village granted other villages yielding an equal revenue, and in 1847 confirmed the grant, making it rent-free. On A's death the grant made by him was confirmed by his legitimate son, the appellant, in certain pottahs, in which however no reference was made to the provision in the earlier grant by the father for the substitution, in the event of the mortgagor redeeming, of villages yielding an equal revenue. After the passing of Act XIII of 1866, the mortgagor obtained a decree for redemption and ousted B.

*Held*, that the appellant was bound by his father's agreement in the pottah of 1846 to make over to B villages yielding a revenue equal to that of the village which had been redeemed.

**APPEAL** from a decision passed by the Court of the Commissioner of Rai Bareli Division in Oudh.

C. W. Arathoon, for the Appellant.

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 Judgment.

The judgment of their Lordships of the Judicial Committee (1) was as follows:—

Their Lordships, after giving full consideration to the arguments of Mr. Arathoon in support of this appeal, do not see their way to disturb the concurrent judgments of the two Courts below.

The action was brought by the respondent Bhyron Bux Singh, who is the illegitimate son of Rajah Shumshare Bahadur Singh, who is the legitimate son of the late Rajah, and his claim was to obtain villages or shares of villages in talook Behlolpur, yielding an annual jumma of Rs. 3,650, in lieu of a village called Sawansa, which had been given to him by various pottahs executed by his father, and by other pottahs which were executed by the present Rajah.

The first pottah is one which by the English date was made on the 14th June 1846. It seems that the village Sawansa was under mortgage to the late Rajah, who appeared to entertain a doubt whether the mortgagor would redeem it; but in the grant of it to his illegitimate son he made a provision for the event of the mortgagor redeeming the estate. The grant is in these terms: "I, Rajah Shumshare Bahadur Singh, do hereby declare that I having obtained taluka Sawansa by mortgage, have given it as a zemindary grant to Baboo Bhyron Bux Singh, and relinquished my claim in his favour." Then, "In the event of the mortgage being redeemed, I will make over to him in lieu of the Sawansa estate villages from taluka Behlolpur yielding an equal revenue. I have, therefore, executed this as a zemindary grant lease." That is a clear provision that in the event of the village Sawansa being redeemed, other villages of equal value shall be substituted for it.

The next grant from the father is on the 27th November 1847, which is in confirmation of the former grant, but gives the estate on more favorable terms: "I, the Rajah, give the entire taluka of Sawansa, &c., including land revenue and cesses, as rent-free nankar to Baboo Bhyron Bux." It is given rent-free, and, therefore, on terms more favourable to the son.

(1) Sir MONTAGUE E. SMITH, Sir ROBERT P. COLLIER, and Sir HENRY S. KEATING.

Then there is a further grant in the lifetime of the father on the 28th August 1850. It seems to have been made by the Rani on behalf of the Rajah. It is stated in the record to be "executed by Rani Bulraj Kunwar;" but the grant is in the following terms:—"Rajah Shumshare Bahadur Singh. I execute this as an ancestral zemindary lease of Ghatampur, Raepur, Muarpur, and Manyarpur in favour of Bhyron Bux Singh. He is to have these villages rent-free," that is a grant of other villages than Sawansa, and is only material as part of the history of the gifts made by the father to the illegitimate son. These grants were all made in the time of the Nawab, and before the conquest of Oudh by the British. That conquest having taken place, and Lord Canning's proclamation confiscating the estates in Oudh having been made on the 15th March 1858, the present appellant obtained the sunnud of the Behlolpur taluk from the British Government; but before he got the sunnud, and presumably after the British Government had settled the taluk with him, he granted two pottahs to his brother, which are material in considering the position in which the two brothers stood at the time when the present dispute arose between them.

The first of these pottahs is dated the 9th August 1858, and is in these terms: "I, Rajah Bijai Bahadur Singh, of Pergunnah Partabgarh, have given taluka Sawansa to Baboo Bhyron Bux Singh as a zemindary for his maintenance. I will take Rs. 2,501 as rent by usual instalments." He grants to his brother the taluka Sawansa, but reserves a rent of Rs. 2,501. By a postscript to the grant the rent is virtually reduced by Rs. 500. This is the postscript: "He is to receive further Rs. 500 nankar annually, leaving the rent payable to be Rs. 2,001. I will have no objection to having said amount deducted." That grant does not refer to the provision in the original grant by the father for the substitution of other villages in case Sawansa should be redeemed; but in a subsequent grant, which is of the date of 17th November 1861, there is a passage, the construction of which has been disputed, and to which reference will presently be made. That grant is: "I, Rajah Bahadur Singh, of Pergunnah Partabgarh, do hereby execute as a lease of the whole of taluka Sawansa, including land

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 Judgment.

revenue and sayer, and of the villages of Raeptr, Kalan, and Ghatampur in taluka Behlolpur," which were the villages mentioned in the subsidiary grant of the father, "in favour of my brother, Bhyron Bux Singh, at an annual rent of Rs. 2,001 Queen's coin, which he will pay by usual instalments. This lease is given to him in perpetuity." Then there is this passage: "Whatever Dudwa Sahab, my father, had granted, I have mentioned also." Those words were obviously inserted with reference to something beyond what had been contained in the previous part of the grant; and their Lordships think it may reasonably be inferred that it was intended by the Rajah to confirm by these words that part of the father's grant which provided for the substitution of villages in case Sawansa was redeemed and taken away from his illegitimate son. There is nothing else shown to which these words could refer. These are the grants on which the plaintiff founds his case.

What happened was, that after the Act XIII of 1866 had been passed, by which it was understood that the right of mortgagors were set up and the bar of limitation removed, the mortgagor of the estate of Sawansa took proceedings to redeem it, and obtained a decree for redemption. That decree was obtained in a suit against the Rajah and his illegitimate brother; both were bound by it, and the estate of Sawansa passed from the hands of the illegitimate son into the possession of the mortgagor. He was, therefore, deprived of the estate which his father had given and his brother had confirmed to him.

That being his position, he brought this suit in order to obtain other villages in the taluk in substitution for the estate which he had thus lost. The first and great defence of the present Rajah is, that he was not entitled to any thing, that the agreement in the father's original grant that the estate should be substituted was not continued in the father's subsequent grants made by himself. Their Lordships, however, think that the father's subsequent grants did not abrogate this agreement, and they have already declared their opinion to be that in the last grant, which he himself made, he confirmed it. They are, therefore, clearly of opinion that the plaintiff was entitled to this substitution, unless something has occurred

subsequently between the brothers to deprive him of that right.

Now it is said that there was an agreement made at the time of the settlement of this taluk before the Settlement Officer which destroyed the plaintiff's right altogether, or if it did not destroy his right, altered the terms upon which he was entitled to get a substituted estate. The settlement proceedings are, unfortunately, not set out at length in the record. So much as appears of them is to be found at page 10. It would seem that at the time of the settlement the present plaintiff put forward a claim—this was before the redemption of the Sawansa estate—to have Sawansa settled with him as an under-proprietor. This claim is not upon the record, and what we have is a petition of the Rajah, which recites it. His petition is: "That the claim brought in your Court by Baboo Bhyron Bux Singh to under-proprietory right of taluka Sawansa is just. The estate has all along been in his possession, under a zemindary grant made by Rajah Shumshare Bahadur Singh, petitioner's father, as well as under the grant made by petitioner himself; the petitioner, therefore, prays that the name of Baboo Bhyron Bux be recorded as under-proprietor of Sawansa estate included in taluka Behlolpur, Pergunnah Partabgarh, without any condition, to which I have no objection, and I admit the claim in every way, but the estate should remain included in taluka Behlolpur."

Now, although we have not the claim, it may be presumed, from the Rajah's petition, that the plaintiff based it upon the grants to which reference has been made, and therefore that the claim was to have this estate upon payment to the Rajah of, at most, a rent of Rs. 2,001; and if the record had shown no more than this petition, there would be nothing to show an intention to alter the plaintiff's right to have an estate substituted in the event of Sawansa being taken away, or the terms on which he was to hold either Sawansa or the substituted estate.

But it is said that what follows, although it may not displace the plaintiff's right to have an estate substituted, does interfere with his right to have it upon the old terms, that is, upon the

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 ———  
*Judgment.*  
 ———

terms of paying the rent of Rs. 2,001. It is contended that it creates an arrangement by which he was to hold the Sawansa estate upon the terms of paying Government revenue and a malikana of 5 per cent. to the Rajah. The whole of that contention is based upon the order of the Settlement Officer, which is in these terms : "Rajah Bijai Bahadur Singh personally filed this to-day,"—that is referring to his petition,—“and admitted its contents. As Baboo Bhyron Bux is to be recorded under-proprietor of the Sawansa estate without condition, it is desirable, for the security of the taluka, that his liability to pay the talukdari allowance at the rate of 5 per cent. besides the jumma which may be fixed, should be noted; and as the Rajah and Baboo Bhyron Bux assent to this: ordered, that the name of Baboo Bhyron Bux be entered as under-proprietor of all the villages in taluka Sawansa.” That is a note of the Settlement Officer. It no doubt is stated to have been assented to by the Rajah and by Bhyron Bux, but it would be unreasonable to come to the conclusion from this unexplained note of the Settlement Officer, which he has inserted in his order, that the brothers intended so materially to change the arrangements which had existed up to that moment, and which were recognised in the petition filed by the Rajah,—so materially that the plaintiff, instead of paying a rent of Rs. 2,001, would have to pay a rent, including the Government revenue and the malikana, of Rs. 3,650. It may be that this note was only intended for the purposes of the Government; but however that may be, there is nothing which is so clear and free from ambiguity that it can be relied on to establish that the brothers intended to alter the rights as they existed between themselves at the time when the settlement was made, and when the petition of the Rajah was filed assenting to the plaintiff's claim in all its terms.

Their Lordships would have been glad to know what was actually done and what was the rent really paid by the plaintiff after the settlement was made; but the record is entirely silent upon these things. That this question could not have been overlooked in the Courts below is plain, for an issue was framed in order to raise the question whether these settlement proceedings did alter

the arrangement as it existed between the brothers. That issue is the fifth: "Were the conditions of the pottah of 5th Kartick 1269 Fusli, or of the pottah of 5th Par Buddi 1255 Fusli, affected by the settlement decree of the 22nd March 1862 to the detriment of the plaintiff's present claim? The Officiating Deputy Commissioner, without giving any reasons, records a verdict for the plaintiff on that issue. But the attention of the Commissioner was expressly directed to this question, and in his judgment their Lordships find this paragraph: "The decree of the Settlement Court does not, I think, affect the merits of the claim. That decree goes no further than to record the status of the plaintiff."

Their Lordships apprehend the meaning of that to be the status of the plaintiff as an under-proprietor, and are disposed to think that the effect of the order had been that for which Mr. Arathoon contends, these Judges, the Assistant Commissioner and the Commissioner would have known that that was so. They are much better acquainted with what is meant by the orders of the Settlement Officer than their Lordships can be, and they had the means of satisfying themselves as to what this order really meant by reference to the proceedings or by directing inquiries. Their Lordships think that credit must be given to the Judges below, who had their attention called to the issue, and to the decree which is referred to in it, that they did not form their opinion without due investigation and consideration.

On the whole, therefore, their Lordships think that it would be exceedingly dangerous for them to act upon the speculation that this note embodied in the order of the Settlement Officer was intended to override the former arrangement of these parties. They will, therefore, humbly advise Her Majesty that the judgments appealed from should be affirmed, and this appeal dismissed.

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BIJAI  
BAHADUR  
SINGHBYRON  
BUX SINGH.

Judgment.



## [CIVIL APPELLATE JURISDICTION.]

1879  
No. 121 of 1877. MOHESH CHUNDER BANERJEE AND }  
ANOTHER . . . . . }

AND

RAM PROSUNNO CHOWDHRY . . . . .

*Regulation VIII of 1819, sections 13 and 17—Mortgagee, Interest of—  
Charge—Priority—Voluntary payment.*

In order to prevent the sale of a taluq under Regulation VIII of 1819, the plaintiff, to whom the taluq had been mortgaged under a bond which provided that the amount advanced thereunder should be a charge on the surplus proceeds in the event of a sale, paid the amount of the arrears due.

*Held*, that the plaintiff as mortgagee had a sufficient interest to protect, that the payment was not a voluntary payment, and that the amount of such payment was a valid charge on the property.

**A**PPEAL against a decision passed by the District Judge of West Burdwan.

In this case the plaintiffs sued to recover the sum of Rs. 6,901-6 under the following circumstances: They alleged that defendants Nos. 1 and 17 borrowed Rs. 645 from their agent in order to pay the Maharajah of Burdwan the rent of a certain putni taluq called Ouda, which stood in their names, though held by all the defendants, of whom there were forty. To secure this loan, a mortgage bond pledging the taluq was given on the 26th November 1874. The mortgagors covenanted thereunder to repay the loan on the 12th December 1874, in default interest at 5 per cent. per month to be paid from the due date. It was also provided that the amount advanced and interest should be a charge in the surplus proceeds in the event of a sale.

The money was not paid on the due date.

The plaintiffs further allege that the defendants, as putnidars, having failed to pay their rent to the zemindar, they themselves, in order to save their interest as mortgagees of the taluq, had paid the sum of Rs. 2,692-12-6 on the 13th May 1875, as putni

rent of the first half of 1281, and again Rs. 2,363-0-6 on the 16th November 1875, as putni rent of the first half of 1282.

For these sums, with interest at 12 per cent., and the amount due upon the mortgage with interest thereon, they now sued.

The firm of Messrs. Gisborne & Co. were made defendants as assignees of the durputni rights in the taluq of the defendants Nos. 3, 12, 13, 14 and 16.

It appeared that as such assignees they also had, in May 1876, deposited money with the Collector in order to save the taluq from being sold in execution of a decree in a suit brought by the zemindar against the putnidars.

The defendant No. 1 did not appear, while defendant No. 17 admitted the execution of the mortgage, but submitted that he was not alone liable, and asked that the mortgaged property might be put up for sale. Messrs. Gisborne & Co. claimed to have a first charge on the property. The other defendants denied that they were liable on the mortgage, as the defendants Nos. 1 and 17 were not agents for the taluq.

*Baboo Rash Behary Ghose*, and *Baboo Bunsghedhur Sen*, for the Appellants.

*Baboo Bama Churn Banerjee*, and *Mr. Adkin*, for the Respondents.

*Baboo Rash Behary Ghose* contended that the payments made by the appellant to the Collector were not voluntary payments, and that he was entitled to priority over Messrs. Gisborne & Co., because the payments made by him were prior to any advances made by that firm—section 13, Regulation VIII of 1819.

*Mr. Adkin* for the respondents (Messrs. Gisborne & Co.) objected that this point was not taken in appeal. He contended that the payment made by Messrs. Gisborne & Co., as the last payment made for the purpose of securing the estate, was entitled to priority, on the principle applicable to bottomry bonds; they had followed the terms of Regulation VIII of 1819, and had applied for and obtained possession of the land.

It was unnecessary for the plaintiffs to have advanced the moneys paid by them to the Collector, for their interests were

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sufficiently protected under the mortgage bond, which provided that the amount of their loan on the mortgage should be a charge, in the event of a sale, on the sale proceeds. The plaintiffs, therefore, had no interest to protect; the payment made by them was, therefore, a voluntary payment and ought not to be protected.

Baboo *Rash Behary Ghose* (in reply).—The principle of salvage does not apply in such a case as this.

The section says that persons making advances to save the superior tenure are to be considered as mortgagees, in which case they would not be entitled to priority.

The judgment of the Court (1), which was as follows, was delivered by

JACKSON, J. JACKSON, J. :—

The plaintiffs have brought the present suit to recover from the defendants Nos. 1 to 40, to whom were afterwards added certain persons trading under the name of Gisborne & Co., the sum of Rs. 6,901 due under two distinct accounts. The first part or the sum of Rs. 1,290, is made up of the principal due upon a bond, dated 11th Aghran 1281, viz. Rs. 645, and interest of a like amount due upon the same bond. The rest of the claim consisted of two amounts deposited in the Collectorate respectively on the 13th May and 16th November 1875 to stay the sale of a putni talook over which the bond previously mentioned purported to give the plaintiffs a mortgage, and of the interest upon those two payments. The bond out of which the rest of this claim directly or indirectly arose appears to have been executed by the defendants 1 and 17. These two persons are said to be the direct descendants or representatives of the persons originally registered in the zemindar's serishta as owners of the putni, and in fact all the defendants who are co-sharers in the putni may be said to fall under the category of Chowdhrys or Roys descended from these two houses. The occasion of bringing in Messrs. Gisborne & Co. arises from the fact that that firm has acquired either by purchase or by lease the rights and interest of the defendants Nos. 3, 12, 13, 14 and 16, whom accordingly they claim to represent.

(1) JACKSON and TOTTENHAM, J.J. .

The judgment of the Court below, after hearing the evidence, was to this effect, that as to the principal and interest due upon the bond, the persons liable to the plaintiffs were those who signed and made the bond, and those who, being coparceners in the property mortgaged, by their presence and acquiescence were held to have taken part in the transaction, that is to say, the defendants 1, 2, 4, 17, 18, 19 and 22. Against these defendants the Judge made a decree for the amount due on the bond, principal and interest. As to the monies paid in to the Collectorate, which formed rest of the claim, the Judge held that those payments were voluntary, and that plaintiffs had no charge upon the putni talook in respect of those sums.

The plaintiffs appeal both as to the dismissal of the latter part of their claim, and also as that part of the decision which exempts the greater number of defendants from liability under their claim. It appears to us clear that in the circumstances under which this bond was executed, it would be impossible to hold all the defendants, owners of this talook, liable to the plaintiffs. There does not appear to have been any authority, either express or implied, on the part of any of the co-sharers under which the defendants 1 and 17 could bind those persons, and therefore we think that the Judge was quite right in limiting the liability under the bond to the actual signatories, and other defendants who were present and might be taken to have acquiesced in the execution of the bond, and in the contracting of the loan; and for whose benefit in fact the loan was taken. It was suggested that even in this view of the case the number of defendants against whom the decree could be passed might have been extended. But it seems to us that the Judge has gone quite as far as he could, as to the number of such defendants. So far we think the decision of the Judge was correct.

The others and somewhat less simple part of the case is as to the character of the payments made by the plaintiffs on account of the zemindar's rent. It was contended on the part of two sets of respondents, and in particular on behalf of those defendants who are called Messrs. Gisborne and Co., that, though it could not be denied, regard being had to the strong opinion expressed by the Judicial Committee of the Privy Council

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in the case of *Nogendro Chunder Ghose vs. Sreenuttj Dossee*, 11 Moore's, I.A., 258, that the payment of revenue due to the Government upon a talook by the mortgagee, being a person having such an interest in the talook as entitled him to pay the revenue due, entitles such mortgagee to a charge on the talook as against all persons interested therein for the amount so paid: and further that a like principle on like considerations would apply to a case of payment of zemindar's rent by a person having an interest in the putni, the old Sale Act, I of 1845, and Regulation VIII of 1819, being alike silent as regards any specific provision to this effect, yet that such principle would not apply to a case where the mortgagee was already protected in any manner, so that in fact the omission to pay the Government revenue or the putni rent would not involve a loss of his advance; and it was suggested that in the present case such protection was in fact provided for the mortgagee by a stipulation in the bond that in the event of a sale for arrears of the zemindar's rent, the lender mortgagee should be entitled to a first charge upon the surplus proceeds of the sale. Mr. Adkin, who laid this argument before us with much ability, was unable to refer to any authority on this question of principle, and in point of fact it does not appear to us that the circumstance of a mortgagee having provided or attempted to provide some protection to himself of the kind referred to in this suit would deprive him of the benefit of those equitable considerations for which authority is derived from the decision in *Nogendro Chunder Ghose's* case. But further it appears pretty plainly on an examination of the case that in fact the so-called protection contained in this bond was really no protection at all, and placed the plaintiffs in no better position than they would have been in if no such condition had been inserted. It only purports to say:—"If the aforesaid lot be sold at auction for arrears of rent, then you shall realize the amount with interest from the surplus sale proceeds of the aforesaid lot, and we shall have no objection against it."

Whether or not such words could be considered as constituting a charge upon the property, it seems clear that in the event of a sale the surplus could only be dealt with in accordance with the terms of clause 4, section 17 of Regulation VIII of

1819, that is to say, "held in deposit to answer the claims of the talookdar's of the second degree, or of others who, by assignment of the defaulter, may be at the time in possession of a valuable interest on the land comprising the talook sold or any part of it." We think, therefore, that the plaintiffs in this case had an interest to protect. They had not merely a right to recover their advance, but they held a mortgage to a certain extent over this property which, in the event of non-payment of the sum advanced, might have been sold for it. It appears to us, therefore, that the payments made by the plaintiffs to prevent the sale of this taluq under the Putni Sale Law were not voluntary payments, but constituted a good charge on this property, and it makes no difference for this purpose whether the suit upon the bond is followed by a decree as against all the defendants sued or against a part of them. In the latter case the plaintiffs will stand in the same position as if they had a mortgage of an undefined share of the property, and that interest would authorize them to make the payment which they did. That part of the judgment, therefore, must be set aside.

Then there arises another question, that is to say, one which is somewhat vaguely indicated by the 12th issue framed by Mr. Tweedie, the Officiating Judge, on the 16th November 1876, and the case must be remitted to the Court below in order that the evidence may be given and received upon the issue on that point. The issue will be whether Messrs. Gisborne & Co. have taken any and what interest in this taluq; whether they have made any payments on account of the zemindar's rent and are in possession under clause 4 of section 13 of the Regulation; and what amount, if any, is due to them in respect of such advances. This enquiry however, must be preceded by the defendants in question being placed on the record in their proper names, and the finding of the Court below on the above issue should be sent up to this Court for final orders.

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CHUNDER  
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RAM  
PROSUNNO  
CHOWDHRY.

*Judgment.*

JACKSON, J.

## [CIVIL APPELLATE JURISDICTION.]

1880  
March 9th.

BEMOLA DOSSEE (PLAINTIFF) . . . . . APPELLANT ;

AND

MOHUN DOSSEE AND OTHERS (DEFENDANTS) . RESPONDENTS.

*Hindu Law—Joint family property, Power of one member to mortgage for partnership debts—Karta, Power of, to mortgage family property—Partners—Equity.*

A and B, not members of a joint family, carried on a partnership business which was financed from time to time by the defendants. On the death of A, his share descended to his three sons, two of whom died intestate without issue, each leaving a widow. The business was continued, but the two widows took no part in the management of the business, the third son C, who was joint with them, acting therein, on their and his own behalf. To secure certain advances made by the defendants, C and B mortgaged to the defendants certain immoveable properties belonging to the joint family of which C was a member, together with property belonging to B. Upon this mortgage a decree was subsequently obtained against the parties thereto, and in execution of such decree the joint family properties were sold.

In a suit brought by one of the widows to have it declared that her share was not bound either by the mortgage or the decree, *held*, that the suit must be dismissed on the ground that C had power to bind the whole property for the purpose of the business. *Held*, further, that, assuming she was not bound by the decree to which she was not a party, she was liable for her share of the debt secured by the mortgage, and could not seek to re-open the case without making in her plaint an offer to pay off her share of that debt.

*Ram Lall Thakursidas vs. Lakshmichand Muniram*, 1 Bom. H. C. R., Appx. 51 ; and *Johurra Bebee vs. Sree Gopal Misser*, I. L. R., 1 Cal., 470, followed.

**A**PPEAL from a decision passed by Mr. Justice WILSON.

The plaintiff in this case sued to set aside a mortgage bond executed by the defendant Gourchurn and another in favor of the defendants Sonatun Dass, Roop Loll Dass, Roghonath Dass and Mohineymohun Doss, on the ground that it was void as against her.

It appeared at the trial that Ramlochun Soor (who is the common root of title of all the parties in the suit) carried on

business for many years in Dacca and Calcutta in partnership with Doorgachurn Dhur, his son-in-law.

While both those persons were living, the properties mortgaged under the bond in question were purchased. Two of them were purchased in the joint names of Ramlochun and Doorgachurn, and it was expressly admitted in the plaint that they were purchased out of partnership funds. The remaining four properties were purchased by Ramlochun, but whether out of the proceeds of the business or not, did not appear.

Ramlochun died about 14 years ago, leaving three sons, Obhoychurn, Sreechurn, and Gourchurn; the second defendant Obhoychurn died in 1868 intestate without issue, leaving the plaintiff his widow and heiress. Sreechurn died in 1872 intestate and without issue, leaving the defendant Mohun Dossee his widow and heiress. Doorgachurn died in 1877. The three brothers after their father's death continued to be a joint family. There had never been any partition or severance in estate.

The business was carried on after Ramlochun's death by his three sons and Doorgachurn, and by the survivors of these persons down to about three years ago when it became insolvent.

It was proved that at one time the partnership had capital of its own, but that before the death of Ramlochun that capital had been lost, and the business has since been carried on with borrowed money. It was further proved that for very many years past, since long before Ramlochun's death, the funds so needed for the business, except so far as they were obtained from time to time by means of hundis, had always been advanced upon bath-chittas by the firm now represented by the defendants, the Dasses.

Early in 1874 the defendants, the Dasses, became alarmed in consequence of a heavy loss from the failure of another firm, to whom they had been making advances in like manner for many years, and pressed for security. The amount then due to them was Rs. 21,145-5-3. Accordingly on the 6th March 1874 Gourchurn and Doorgachurn (Obhoychurn and Sreechurn being then dead) executed the mortgage in question. It included the properties now in dispute, together with others as to which no controversy arises, and it was to secure the existing

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debt of Rs. 21,145-5-3 and further advances, up to a maximum of Rs. 31,000.

An immediate further advance was made, and the Dasses continued to make advances as before, sums of money being from time to time repaid them. In June 1876 the balance due to them was Rs. 29,605-5-3.

On the 8th June 1876 the Dasses brought a suit upon their mortgage against Gouchurn and Doorgachurn, which suit was, at a later stage on the death of Doorgachurn, revived against his representatives.

On the 17th August, the defendants not appearing, a decree was made for an account and payment of the amount due, and for sale of the property upon default. The accounts were taken and the property sold.

The plaintiff in this case also asked for partition of the family property.

The judgment of Mr. Justice WILSON, after stating the facts, proceeded as follows :—

“The main question is, whether Gouchurn had under the circumstances power to mortgage the family property. I think he had. The ancestral business of an undivided family is a piece of family property just as much as inherited land.

It follows, I think, upon principle, that the managing members of the family must have the same power to pledge the credit or property of the family for the maintenance of the business as for the preservation of any other piece of property. That is to say, they must be able to do so when a sufficient case of necessity for the benefit of the estate arises—*Hunooman Persaud Panday vs. Mussamut Babooee*, 6 Moore's I. A., 393, 423, and the authorities are to the same effect. It was so held by the Bombay High Court in *Ramlal Thakursidas vs. Luchni Chand Muniram*, 1 Bomb. H. C. R., Appx. 51, and in *Tumbak Arrant vs. Gopaul Set*, *ibid*, p. 27. This view was approved by PONTIFEX, J., in *Johura Bibee vs. Sree Gopaul Misser*, Ind. L. R. 1 Cal. 470, and by AINSLIE and KENNEDY, J.J., in *Shamnarain Singh vs. Rughooburdayal*, Ind. L. R., 3 Cal. at p. 510. See also *Joykisto Cowar vs. Nittyanund Nundy*, Ind. L. R., 3 Cal. 738.

With regard to the question of necessity, where a business is carried on upon credit, whether it be an English house living upon the discount facilities given by European bankers, or a native firm living upon advances made by native shroffs upon hath-chittas—in either case, if the banker insists upon security, it is, I think, a commercial necessity to give the security. The alternative is the stoppage of the business.

For these reasons I am of opinion that the mortgage was good, and that therefore the plaintiff's suit must fail.

Several questions were argued by Counsel, which, having regard to the view I take of the main question, it is not necessary to decide.

English authorities were cited to show that a partner has no authority as such to borrow money on mortgage. Whether the rule would apply with the same strictness in this country, where the English distinctions between reality and personalty do not exist, it is not necessary to say. This is the case, not of a mere contractual partnership, but of a joint family.

The question was argued on both sides, whether such a suit as this could be maintained by one partner without first settling accounts with the partnership, and several cases were cited bearing upon the question. It is unnecessary to express any opinion in this matter.

The question of limitation also was much discussed. Upon this question, too, I express no opinion.

There are other points which were not raised at the hearing, but which might perhaps have proved obstacles in the plaintiff's way had the decision been in her favor upon the main question.

She claims not to set aside the mortgage, but to have it and the decree declared void so far as it affects what she calls her share of the properties. It is at least doubtful whether such a suit could lie in any case—*Sree Raj-sarain Tewari vs. Luchmun Persaud*, 4 Beng. L. R. (A. C.), 118, and *Mussamat Phoolbass vs. Lalla Joggessor Sahoy*, L. R. 3 I. A. at p. 27.

She asks to have the decree for sale declared void as against her interest. But there is no evidence of any fraud or misconduct on the part of those who obtained it. The suit will be dismissed with costs.

Against this decision the plaintiff preferred this appeal.

*Bonnerjee* and *Allen*, for the Appellant.

*Phillips*, and *T. A. Apcar*, for the Respondents.

*Bonnerjee*.—The managing member of the family had no power to mortgage our share of the property without obtaining our acquiescence and signature to the mortgage.

If my client had been an infant, she would have been bound by the acts of the managing member, but only such acts as are incident to and necessarily flowing out of the carrying on the trade—*Ramlal Thakursidas vs. Lakhmichand Muniram*, 1 Bom. H. C. R., App., 51; *Petum Doss vs. Ramdhone Doss*, Taylor's App., 279.

The Kurta may do all acts usually connected with the family business, but he cannot, except with the consent of the adult

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members of the family, deal with immoveable property for the purpose of raising money for the business.

In *Deendyal Lall's* case, L. R. 4 I. A., it is said at p. 251 that all the co-sharers should have been made parties to a suit upon a bond given by the father of the joint family. See *Suraj Buns; Koer vs. Sheo Prosad Singh*, L. R., 6 I. A., 101, (S. C.) 4 C. L. R., 226.

The case of *Johurra Bebee vs. wreegopal Misser*, I. L. R. 1 Cal., 470, relied on in the Court below, does not apply here.

[PONTIFEX, J.—That case is an authority for saying, that, although your client may not be liable on the mortgage, she is liable for the debt.]

If she is liable for the debt, there is no reason for upholding the mortgage.

The case of *Joykisto Cowar vs. Nettyanundo Nundy*, I. L. R., 3 Cal., 738, like the other cases, proceeded on the liability of a minor for debts contracted by his guardian in the course of the family business.

The Court below refers to *Rajaram Tewari vs. Luchmun Prosad*, 4 B. L. R. (A. C.) 118, and *Mussamut Phoolbas Koonwur vs. Lalla Jogeshwar Sahoy*, L. R. 3 I. A., p. 27, as making it doubtful whether the suit was properly instituted, but these cases were under Mitakshara law, according to which no member has a definite share, as in Bengal, in the family property—*Appovier's case*, 11 Moore's I. A., 75. The question is discussed in *Gourcenath vs. Collector of Monghyr*, 7 W. R., 5.

There is no case except that of *Gopalnarain Mozoomdar vs. Muddomutty Guptee*, 14 B. L. R., 21, where, there being adult members of a joint Bengal family, the Kurta alone has been allowed to sell the family property.

[PONTIFEX, J.—In *Suraj Buns; Koer's* case, L. R. 6 I. A., p. 101 4, C. L. R., p. 233, the Privy Council say:—"All are agreed that the alienation of any portion of the joint estate without express or implied authority may be impeached by the coparceners, and that such authority will be implied, at least in the case of minors, if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes. It is not so clearly settled, whether in order to bind adult co-parceners their express consent is not required."]

The question has frequently been before the Court—See *Pranath Doss vs. Kalishunker Ghosal*, 1 Select Rep., 45; *Aushotos Dey vs. Mohesh Chunder Dutt*, Fulton, 380, see p. 382; *Doe d. Surroop Chunder Ghose vs. Ramnarain Doss*, ib., 376, see note, p. 368. The last of these cases is a strong authority in my favour.

It is not shown that we had any notice of the suit on the mortgage until the advertisement of sale in execution.

*Allen* (on same side) cited *Sudabert Persad Sahu vs. Phoolbash Koer*, 3 B. L. R. (F. B.), 31; on appeal L. R. 3 I. A., 7; *Anundchund Rai vs. Kishen Mohun Bunoja*, 1 Select Rep., 115; *Colebrooke's Digest*, vol. II, chap. V, p. 98; *Beesheyshur Dutt vs. Bukhoree Sahoo*, 5 S. D. A., 335; *Kounla Kant Ghosal vs. Ram Huree Nund Gosamee*, 4 Select Rep., 196.

*Phillips*, for the Respondents.

The consent of the widow in this case must be presumed; for, according to Hindu Law the widow of a deceased brother must live with her husband's brother, and be guided and controlled by him.

The business is family property, and this mortgage was merely to raise money to be used in the business, the property mortgaged having been originally purchased from the profits of the business. The individual rights of members of a joint family have no doubt advanced further under the Bengal than under the Mitakshara school, yet I submit, not so far as to alter the control of the family property. The manager represents the family so far as the outside world is concerned. That this is the position of the Kurta of the family appears from *Chuckun Lall Sing vs. Poran Chunder Singh*, 9 W. R., 483, (which does not appear to have been Mitakshara case), and *Sham Narain Singh vs. Rughooburdial*, I. L. R., 3 Cal., 508; 1 C. L. R., 343.

[PONTIFEX, J.—The widow was undoubtedly interested in the partnership. In England a legal mortgage of partnership real estate cannot be made without the concurrence of all the partners,—see Lindley on Partnership, p. 229. Lindley, however, goes to say that a manager may pledge partnership property as security for advances.]

The fact of Doorga Churn having joined in the mortgage is evidence of the necessity. It was only necessary for us to

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satisfy ourselves that there was an apparent necessity to bring us within the case of *Hunooman Persaud Pandey vs. Mussamut Baboee Munraj Koonwaree*, 6 M. I. A., 393.

I rely on the case of *Gopal Narain Mozoomdar vs. Muddomutty Guptee*, 14 B. L. R., 21, where adults who had not joined on a mortgage, were held to be bound thereby.

[PONTIFEX, J.—There is another case in 2 Moore's I. A., p. 487—*Juggeewun Keeka Shah vs. Ramdos Brijbookun Das* in which it was held that a member of a joint family, who had joined in a mortgage of a village which was partnership property, was held to be bound by the mortgage.]

[*Bonnerjee*.—There the question was begged. The Judicial Committee say: "He was cognizant afterwards of the execution of the bond, and he is bound by the contents of that bond, and he must be considered for the purposes of this suit as being a mortgagor" (see pp. 599, 500).]

It does not appear from the case of *Doe d. Surroop Chunder Ghose vs. Ramnarain Doss*, Fulton's Rep., 367, that there was a joint family.

The case of *Goureenath vs. Collector of Monghyr*, 7 W. R., 5, is in my favour. What MARKBY, J., there says as to the power to bind absentees applies equally to *pardah nashin* women. The plaintiff was behind the *pardah* at Dacca.

*T. A. Apcar*, on the same side, quoted *Muthoora Koonwaree vs. Bootun Singh*, 13 W. R., 31; *Surut Narain Chowdhry vs. Shew Gobind Pandey*, 11 B. L. R., App., 29; and *Modhoo Dyal Singh vs. Golbur Singh*, 9 W. R., 511, as showing that in seeking to recover back the family property the plaintiff was bound in equity to pay into Court her share of the debt for which it had been mortgaged.

*Bonnerjee*, in reply.

The judgment of the Court (1), which was as follows, was delivered by

PONTIFEX, J. PONTIFEX, J.:—

The question we have to decide in this appeal is, whether two adult ladies, who are the widows of two members of an un-

(1) GARTH, C.J. and PONTIFEX, J. •

divided Hindu family, governed by the law of the Dayabhaga, are bound by a mortgage of joint family property made by the surviving brother and managing member of the family, as to which they allege they were not consulted; and by the subsequent decree for sale in a suit by the mortgagee against the managing member as sole defendant.

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The plaintiff, who is one of the two ladies above mentioned, the other of them being a defendant in the same interest with the plaintiff, by her plaint prays, that her rights in the mortgaged premises may be ascertained and declared; that it may be declared that her share is not affected by the mortgage; that the decree in the mortgage suit may be declared fraudulent and void as against her; that an account may be taken of rents and profits, and her share ascertained and paid; and that the mortgaged property may be partitioned.

PONTIFEX, J.

If the case turned on a question of joint family property, pure and simple, it would be doubtful whether, apart from consent, the plaintiff would be bound by a mortgage made by the managing member alone, or by a decree on the mortgage obtained against the managing member as sole defendant, even though the mortgage was made for a debt in respect of which she was liable jointly with the managing member.

It is certainly doubtful under the law of the Mitakshara, where a member of a joint family before partition has no definite share, whether an adult would be bound by the mortgage or alienation for necessary purposes by the managing member of the family—see *Suraj Bansi Koer vs. Sheo Prosaud Sing*, L. R., 6 I. A., 101; and if there is any difference in this respect between the law of the Mitakshara and the law of the Dayabhaga, it would seem to be still more doubtful under the latter.

The question to be determined in this case, however, is not, in our opinion, a question of joint family property, pure and simple, for it is materially affected by other circumstances.

Ramlochun Soor was the father of Obhoychurn, Sreechurn and Gouchurn.

During his lifetime Ramlochun carried on business in *Benatta* in partnership with a third person, whom and whose

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representative we shall hereafter refer to as the independent partner. During Ramlochun's life the properties, to which this suit relates, were purchased; and two of those properties were actually purchased in the names of Ramlochun and the independent partner.

Ramlochun died more than 14 years ago, intestate; and his property and his share in the partnership business were inherited by his three sons, who conducted and managed the same.

Obhoychurn, the plaintiff's husband, died in 1868, intestate and without issue; and Sreechurn died in 1872, intestate and without issue, leaving a widow who is a defendant to this suit, in the same interest with the plaintiff.

After the death of Obhoychurn and Sreechurn, Gourchurn continued to manage the family share in the partnership, and the joint family property; and he and his brother's widows continued to live as an undivided family, the profits of the family share in the business being blended with the income of the joint family property and employed for the benefit and maintenance of the joint family; for we agree with the lower Court in altogether disbelieving the evidence adduced by the plaintiff, meagre as it is, as to her withdrawing from the business or altering her position with respect thereto.

The business had for years been financed by the defendants.

In 1874, the amount due to them was over Rs. 21,000.

The business had pressing need of further advances, and application was made to the defendants, who agreed to make advances, but insisted upon having security for the Rs. 21,000, and for further advances up to Rs. 31,000 on the whole.

In March 1874, Gourchurn and the independent partner executed a mortgage accordingly, which not only covered the joint family property, in respect of which this suit is instituted, but also property of the independent partner.

Upon the execution of the mortgage a further advance was made.

In June 1876, there was a balance due on the mortgage of over Rs. 29,000.

On the 8th June 1876, the mortgagees instituted a suit on the mortgage against Gourchurn and the independent partner;

and on the 17th August they obtained a decree, and under it one of the properties purchased by Ramlochun has been sold, but the purchaser has not been made a party to this suit.

This suit in fact, except so far as it asks for partition, which we consider is asked for merely as a secondary relief, seeks only for a declaratory decree.

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—  
*Judgment.*

It is apparent from the foregoing circumstances, therefore, that this is not simply a case in which Gouchurn mortgaged joint family property as the managing member of the family. These ladies continued to be interested in the business; they must be taken to have known that it was financed by the defendants, and that it required advances; they allowed Gouchurn to stand forward as the ostensible owner of the family share; they participated in and were maintained out of its profits; and they were, in our opinion, certainly liable for the debts of the business. As authorised manager of the family share in the business Gouchurn was clearly capable of making all necessary business contracts. Did it lie within his power as such manager to raise monies necessary for the business, (as to which there is no question) by mortgaging the joint family property?

PONTIFEX, J.

If the joint family property can be considered as partnership property belonging to the family share of the business, we think there would be no doubt that he could pledge it. Mr. Justice LINDLEY, in his book upon Partnership, states that the English law, which in this respect is founded on reason and convenience, is as follows:—

“The writer is not aware of any decision in which an equitable mortgage made by a partner by a deposit of deeds relating to partnership real estate, has been upheld, or the contrary; he can, therefore, only venture to submit, that such a mortgage ought to be held valid in all cases in which it is made by a partner having an implied power to borrow on the credit of the firm” (p. 229, 1st Edn.)

In this case Gouchurn certainly had an implied power to borrow on the credit of the joint family as partners in the firm; also we think he had power to borrow on the credit of the joint family as a joint family for the purposes of the firm.

A joint family carrying on business is necessarily a peculiar



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kind of partnership; it does not cease on death, but the shares in it are inheritable along with the shares in the joint family property.

We agree with the decision in 1 Bom. H. C. R. Appx. 51,—*Ramlal Thakursidas vs. Lakhmichand Muniram* (approved in the case of *Johurra Bebee vs. Sree Gopal Misser*, I. L. R., 1 Cal., 471.) In

that case the following propositions were stated as law, pp. 71 and 72. "The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade. Third parties, in the ordinary course of *bond fide* trade dealings, should not be held bound to investigate the status of the family represented by the manager whilst dealing with him on the credit of the family property.

"Were such a power not implied, property in a family trade, which is recognized by Hindu Law to be a valuable inheritance, would become practicably valueless to the other members of an undivided family wherever an infant was concerned; for no one would deal with a manager, if the minor were to be at liberty on coming of age to challenge as against third parties the trade transactions which took place during his minority.

"The general benefit of the undivided family is considered by Hindu Law to be paramount to any individual interest, and the recognition of a trade as inheritable property renders it necessary for the general benefit of the family that the protection which the Hindu Law generally extends to the interests of a minor, should be so far trenching upon as to bind him by acts of the family manager necessary for the carrying on and consequent preservation of that family property, but that infringement is not to be carried beyond the actual necessity of the case."

In the present case the question of necessity or propriety does not arise. And we can see no difference in respect of the law so laid down between families governed by the law of the Mitakshara and the law of the Dayabhaga.

But it is objected that the Bombay case relates only to the power of the manager to bind infants; and that it is no authority for the proposition that he can also bind adults, and no doubt that it is so.

But having regard to the observations in that case as to the peculiar nature of a joint family business, and the opinion expressed by Mr. Justice LINDLEY in his book, with which we also agree, we think that the manager had at least power, for the necessary purposes of the business, to make an equitable pledge of the joint family property which would bind the plaintiff.

The circumstances of the case do not, in our opinion, render it necessary for us to express an opinion whether the plaintiff is bound by the decree in the suit to which she was not a party. The plaintiff is, in our opinion, distinctly liable for the debt and bound by the pledge. She now sues without making any offer to pay off the debt. She is seeking the aid of equity, without offering to do equity.

If she had made such offer, she might perhaps have been entitled to have the decree re-opened and the accounts re-taken, for the purpose of giving her an opportunity of redeeming.

She is either bound by the decree in the mortgage suit or not. If she is bound, we cannot interfere; and if she is not bound, we ought not to interfere by making any declaration except upon the condition of her offering to pay the debt for which she is liable. As she has made no such offer, we must confirm the decree of the Court below, and dismiss the appeal with costs.

We may add that we are the more inclined to arrive at this conclusion, because we think it a highly suspicious circumstance that this lady was not examined by Commission or otherwise, and has not ventured to affirm that she was not cognisant of and consulted with respect to this mortgage. Although we confirm the decree of the Court below, we think it is necessary for us to say that we do not concur in the doubt expressed by the learned Judge at the end of his judgment as to whether the plaintiff's suit would lie at all; for this case being governed by the Dayabhaga the plaintiff would be entitled to a definite share in the joint property.

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—  
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## [CIVIL APPELLATE JURISDICTION.]

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—  
No. 2013 of  
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PURNA NARAIN ADHIKAR (PLAINTIFF) . . APPELLANT ;  
AND  
HEMOKANT ADHIKAR (DEFENDANT) . . . RESPONDENT.

*Limitation Act, IX of 1871, Sched. II, Art. 129—Adoption, Suit to set aside.*

Plaintiff sued in 1877 to set aside an adoption which was alleged to have taken place twenty years before, and, as heir of the husband of the last Adhikar, who died in 1282, to obtain possession of a certain temple and properties attached thereto which the defendant claimed under the said adoption.

*Held*, on the authority of *Raj Bahadoor Singh vs. Achumbit Lal*, L. R. 6 I. A., 110 (S. C.) 6 Cal. L. R., 12, that the suit was not barred by Art. 129, Sched. II of Act IX of 1871.

**A**PPEAL from a decision passed by the Judge of Assam, affirming the decision of the Officiating Deputy Commissioner and Subordinate Judge of Goalpara.

The plaintiff in this case sued to set aside an alleged adoption of the defendant by one Kamessuri Adhikarini, deceased, and to recover possession of the temple of Bistupur and the debutter lands and other property attached thereto. The suit was filed on the 20th September 1877.

The plaintiff alleged that he had been nominated as successor by Kamessuri, and that, apart from such nomination, the temple and the other properties claimed ought to devolve upon him as heir of a brother of her husband.

The defendant, it appeared, had taken possession on the death of Kamessuri who was the last Adhikar in August 1282, claiming to be entitled to the post of Adhikar to possession of the temple and properties by right of adoption to Kamessuri.

It was denied by the plaintiff that any power of adoption had been granted to Kamessuri by her late husband, or that any adoption had in fact taken place.

The defendant in his written statement alleged that he was actually adopted twenty years before under a valid power, by Kamessuri, and submitted that the suit was barred by limitation,

as being a suit to set aside an adoption brought more than twelve years after the adoption had taken place. He further contended that Kamessuri had by a deed duly executed and registered nominated him as her successor.

The fact of the adoption was proved to have taken place as alleged.

The lower Courts both held that the suit was barred under Art. 129, Sched. II. of Act IX of 1871, and the plaintiff filed this second appeal to the High Court.

Baboo *Mohiny Mohun Roy*, for the Appellant.

Baboo *Bhoobun Mohun Dass*, for the Respondent.

The judgment of the Court (1), which was as follows, was delivered by

MORRIS, J. :—

MORRIS, J.

The order of the Judge must be set aside ; because his view that the plaintiff's claim is barred under clause 129, schedule II, Act IX of 1871, cannot be supported. The decision of the Privy Council in the case of *Raj Bahadoor Singh vs. Achumbit Lall*, L. R. 6 I. A., 110, (S.C.) 6 C. L. R., 12 is an authority in point. The case must be remanded in order that it may be tried on the merits.

Costs will abide the result. The appellant is entitled to a refund of the Court fees paid for memorandum of appeal.

### [CRIMINAL JURISDICTION.]

#### IN THE MATTER OF SHEIKH DABU.

*Criminal Procedure Code, (Act X of 1872), section 119.*

Where the accused was charged under section 193 of the Penal Code with having given false evidence, in that he denied having made certain statements which he was alleged to have made to the Inspector of Police, that officer was examined and merely put in two documents containing the statements alleged as the records of what had taken place. *Held*, that these documents being inadmissible in evidence under section 119 of the Code of Criminal Procedure, evidence ought to have been given as to what was actually stated by the accused to the Inspector of Police.

(1) MORRIS and PRINSEP, J.J.

1880  
PUNA  
NARAIN  
ADHIKAR  
v.  
HEMOKANT  
ADHIKAR.  
Judgment.

1880

In re

SHEIKH  
DABU.

Judgment.

**A**PPEAL from a conviction and sentence passed by the Officiating Judicial Commissioner of Chota Nagpore.

The appellant Sheikh Dabu and Mussamut Jumni were charged under section 193 of the Indian Penal Code, with intentionally giving false evidence in a judicial proceeding.

The statements made by them on solemn affirmation which were alleged to be false were recorded by the Deputy Commissioner. It appeared that the accused had previously made inconsistent statements to the Inspector of Police. These statements were recorded by him in documents marked A and B.

Before the Judicial Commissioner the accused denied that they had made the statements alleged to have been made before the Inspector.

In order to prove that the statements had been made the alleged inspector was called as a witness, and in examination put in the two documents A and B, as the records of what had taken place. Another witness who was present was also called, and he corroborated the evidence of the Inspector.

The accused called no witnesses.

Under these circumstances the Judicial Commissioner found the charge proved and sentenced the male prisoner to one year, and the female prisoner to three months' rigorous imprisonment.

The male prisoner now appealed to the High Court.

The following judgment was delivered by the Court (1):—

We think it impossible to sustain this conviction. Apart from the supposed evidence afforded by the Inspector of Police and the exhibits A and B, there is not enough to prove the offence charged against the appellant. But exhibits A and B are not admissible in evidence, *vide* section 119, Code of Criminal Procedure, and the Inspector of Police does not say *what* was stated to him by the accused. He merely refers to A and B as containing their statements. The conviction must, therefore, be set aside and the appellant Sheikh Dabu must be released.

(1) TOTTENHAM and MACLEAN, J.J.

## [CIVIL APPELLATE JURISDICTION.]

WOMESH CHUNDER BOSE (DEFENDANT) . APPELLANT ;

AND

SURJU KANTO ROY CHOWDHRY (PLAINTIFF) RESPONDENT.

1880  
Jany. 15th.No. 680 of  
1879.*Act VIII (B.C.) of 1869, section 29—Limitation, Computation of period of—Arrears of rent, Suit for.*

In suits brought to recover arrears of rent other than instalments payable during the currency of the year, the period of limitation of three years provided by section 29 of Act VIII (B.C.) of 1869 is to be calculated from the last day of the Bengal year following that for which the arrears claimed are alleged to be due.

See *Brojendro Coomar Roy vs. Rakhal Chunder Roy*, I. L. R., 3 Cal., 791.

A plaintiff, who has been unable to file a suit under the Rent Act, on the last day of the period of limitation allowed by that Act, by reason of that being a close holiday, cannot be allowed to file his suit on the following day.

Cf. *Purran Chunder Ghose vs. Mutty Lall Ghose*, 2 C. L. R., 543.

**A**PPEAL from a decision passed by the District Judge of Jessore, reversing a decree of the Subordinate Judge of that District.

The plaintiff in this case sued to recover the rent due in respect of a certain taluq for the year 1280. The suit was filed on the 1st Bysack 1284. In the plaint it was alleged that the previous day had been a close holiday, and that the plaintiff had on that account been unable to file his suit on that day.

The Subordinate Judge held that the suit was barred by limitation under the provisions of section 29, Act VIII (B.C.) of 1869. He was of opinion that the period of three years thereby provided for the limitation of suits for arrears of rent commenced from the last day of the year in which the rent accrued.

The District Judge concurred in this opinion, but he considered that, inasmuch, as the plaintiff had been precluded by reason of the day of limitation having expired on a close holiday from filing his suit in time, it would be inequitable to treat the

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 WOMESH  
 CHUNDER  
 BOSE  
 v.  
 SURJU KANTO  
 ROY  
 CHOWDERY.  
 Judgment.

suit as barred, and he accordingly reversed the decision of the lower Court.  
 The defendant thereupon appealed.  
 Baboo *Bungshidhar Sein*, for Appellant.  
 Baboo *Sreenath Doss*, and Baboo *Mohesh Chunder Bose*, for Respondent.

The judgment of the Court (1), which was as follows, was delivered by

JACKSON, J. JACKSON, J. :—

The plaintiff in this suit claimed arrears of rent for the Bengal year 1280. The plaint was filed on the 12th of April 1877, the corresponding date being, I understand, the 1st Bysack 1284; and it was expressly stated in the plaint that the day before, viz., the 30th Cheyt 1283 having been a close holiday, the plaintiff had been unable to file his plaint on that day. The plaintiff, unluckily for himself, expressly stated in the plaint that his cause of action accrued on the 30th Cheyt.

The Subordinate Judge, in whose Court the suit was brought, citing section 29 of Bengal Act VIII of 1869, ruled that "the time for filing this plaint was up to the 30th of Cheyt 1283." He appears to have considered that there was no privilege in respect of the closing of the Court, and therefore decided that the suit was barred.

The plaintiff appealed, and his appeal was heard by the Judge of Jessore. In that Court the plaintiff appears to have relied upon a judicial interpretation of section 27 of Act VIII, but the Judge concurred with the Court below in holding that that did not apply to section 29. The Judge then cited Act I of 1868 of the Indian Council. That Act, which is commonly known by the name of the General Clauses Act, is in terms an act for shortening the language used in the acts of the Governor-General in Council, and is therefore not applicable to the Acts of the Bengal Legislature. The Judge considered that it was "legal and equitable to accept the guidance of the superior,"

(1) JACKSON and TOTTENHAM, J.J. \*

but I am not aware of any rule of law or equity which extends an interpretation clause of a superior legislature which is limited to the enactments of that legislature to those of another legislature, though it may be subordinate. The Judge went on to say:—"It is also to be noted that the 30th Cheyt 1283 was a close holiday, and the law forbids the filing of suits on such days by closing the Courts. It is true that the general law of limitation does not apply to local Acts according to judicial rulings, but Indian Courts are Courts of Equity, and I think it fair ground for equitable relief to argue that a party should not be told that because he has not performed an impossibility he is out of Court." That is a sentence which I have had a good deal of difficulty in following. It was quite possible for the plaintiff to have filed his suit on the 29th Cheyt if he had been so disposed, and if we are to use equitable considerations for the purpose of over-riding clauses of limitation, legislation would be vain. Therefore, if the matter stood there we should have been unable to concur with the Judge, and we must have reversed his judgment. But it appears to us that another question arises, and that is upon the construction of section 29 which governs this suit. The words which apply are, "suits for the recovery of arrears of rent shall be instituted within three years from the last day of the Bengal year in which the arrear claimed shall have become due." It has not been brought to our notice that the question has been expressly raised and decided, but it seems to have been rather assumed in some cases which come before the Court that the time here spoken of is the year to which the rent related. Now, if the legislature had meant to say that there is no reason why they should not have employed the same phraseology which is used in the last clause of the same section referring to a suit for rent at an enhanced rate, for there they say that the suit shall be instituted within three months from the end of the Bengal year "on account of which such enhanced rent is claimed." If these had been the words employed in the first clause of the section, there would have been no doubt whatever that for the rent claimed for the year 1280, the suit ought to have been brought within three entire years from the last day of Cheyt of that year,

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ROY  
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1880

WOMESH  
CHUNDER  
BOSESURJU KANTO  
ROY  
CHOWDHEY.*Judgment.*

JACKSON, J.

that is to say, within the last day of Cheyt 1283, and no rule of law being applicable to suits for rent in Bengal by which the plaintiff might have an allowance for the day if his period of limitation expired on a close holiday, this suit probably would have been barred. But what the legislature says is three years "from the last day of the Bengal year in which the arrear claimed shall have become due." Now an arrear is defined in section 21 to be "any instalment of rent which is not paid on or before the day when the same is payable according to the pottah or engagement, or if there be no written specification of the time of payment, at or before the time when such instrument is payable according to the established usage." I do not understand that there was any written specification of the time of payment in this case, nor apparently has there been evidence given of the time when such instrument was payable according to established usage. The suit was for the rent of the year 1280. Now, I apprehend that the tenant would not be liable in respect of the whole rent of the year 1280, if his occupation were disturbed at any time before the conclusion of that year. It could not be positively stated that his occupancy had so continued until the last day of the year had expired, and therefore I apprehend there would be no arrear due until the commencement of the first day of the following year. That being so, the year 1281 would be the year in which an arrear on account of 1280 would be payable, that is, assuming the year's rent to be payable in one sum. Of course as regards any instalment payable during the currency of the year 1280, the last day of the year would be the time from which the period would begin to run, otherwise I think it would be the last day of 1281. This suit, therefore, ought, I think, to have been brought within the 30th Cheyt 1284. On these grounds it appears to me that the suit is not barred. Of course if there be any specification of time in the contract between the parties by which the whole rent is payable at any time before the conclusion of the year, then the suit would be barred on that ground, not on the general ground. The appeal will be dismissed with costs.

## [CRIMINAL APPELLATE JURISDICTION.]

IN THE MATTER OF DHAM MUNDUL AND OTHERS. APPELLANTS.

*Cross-examination, Refusal of right of—Criminal Procedure Code (Act X of 1872), sections 186 and 249.*

1880  
Feb. 25th.  
No. 88 of  
1880.

A, B, and C having been charged with murder before a Magistrate, two vakeels presented their vakalutnamahs, and applied to be allowed to conduct the defence of the accused.

The Magistrate refused permission, and after recording the depositions of the witnesses, committed the accused to take their trial before the Sessions Court. In the Court of the Magistrate the only material evidence for the prosecution was that of three witnesses, who on being examined in the Sessions Court, denied all knowledge of the facts to which they had deposed before the Magistrate. Two of them denied having made the statements recorded, while the third admitted the statements attributed to him, but asserted they were false and made under pressure. The Sessions Judge, disbelieving the statements made in his Court, thereupon under section 249 of the Code of Criminal Procedure (as amended by section 20 of the Amending Act) used the previous depositions as evidence in the case, and mainly upon these convicted the accused of murder and sentenced them to transportation for life. Against this conviction and sentence the prisoners appealed to the High Court, on the ground that the previous depositions ought not to have been used as evidence in the case, as the Magistrate had refused to allow their pleaders to appear and cross-examine the witnesses who made the depositions.

The High Court affirmed the conviction and sentence.

**A**PPEAL from a conviction and sentence passed by the Sessions Judge of Mymensingh.

In this case Dham Mundul, Mohur Sheikh, and Kurim Sheikh, were charged under section 302 of the Indian Penal Code, with the murder of one Tariffullah.

The evidence before the committing Magistrate showed that the deceased had an intrigue with one of the witnesses Nikjan, the wife of another witness, Affan. It appeared that Affan had been aware of the intrigue, and informed his brother, the prisoner Kurim.

On the morning of the 2nd of Assin, Tariffullah told Affan that he was going to the hât in the afternoon, and intended afterwards to pay a visit to his brother who lived some distance off. Whether

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DHAM  
MUNPUL.  
Statement.

he actually went to see his brother did not appear, but at midnight he entered the hut where Affan and Nikjan were sleeping. Kurim, it seems, had found out that Tariffullah had returned, and suspecting the cause had told the other two prisoners who were his uncles and lived in the next house.

Tariffullah had only been in the house for a short time, when Affan and Nikjan heard the three prisoners speaking in low tones under the north-end of the hut. Tariffullah had also heard them; suspecting that he was being watched he endeavoured to escape, but as he emerged from the hut, he was seized by the three prisoners and beaten and dragged off.

Both Affan and his wife witnessed the beating, but there was nothing to show that the former knew that Tariffullah had been seized as he emerged from his hut. The three prisoners dragged Tariffullah away to the eastward, and Affan alleged that he saw them take the body across the river which is close to Kurim's house, and then lost sight of them.

On the following morning Nikjan on going to the river saw the body, lying face downwards, on the other side of the river near a village occupied by certain manjhis. The witnesses who gave the above evidence were Affan, Nikjan, and one Musa.

Some manjhis of the village gave evidence that they had discovered the body which they recognised to be that of Tariffullah, but fearing that suspicion might rest upon themselves, they carried it away and hid it in a field belonging to another mouza. There were no marks, they said, of violence on the body.

The body was subsequently discovered in the field where the manjhis alleged they had hidden it.

On the trial before the Magistrate, two vakeels produced their vakalutnamahs and applied to be allowed to conduct the defence. The Magistrate refused permission, saying that the proceedings in his Court were merely preliminary to commitment, and that there would be no use in their appearing before him. There was, therefore, no cross-examination of the witnesses in the Magistrate's Court. In the end, that officer committed all three prisoners to take their trial before the Sessions Court.

On the case coming on for hearing before the Sessions Court, the three witnesses—Affan, Nikjan, and Musa—who spoke to the

act of the beating, denied all knowledge of any such beating. Two of them denied that they had made the statements recorded by the Magistrate, while the other admitted the statements attributed to him, but alleged that they were false and had been made under pressure.

1880  
In re  
DHAM  
MUGDUL.  
Judgment.

The Sessions Judge entirely disbelieved the statements made by these witnesses before him, and allowed the depositions taken by the Magistrate to be put in evidence under section 249 of the Code of Criminal Procedure.

The vakeels for the defence had objected that these depositions were not admissible, as they had not been duly taken by the Magistrate in the presence of the accused person, inasmuch as the Magistrate had refused to allow the vakeels for the prisoners to appear in his Court to cross-examine the witnesses.

The other evidence before the Sessions Judge was substantially that given in the proceedings taken by the Magistrate.

One of the assessors who sat in the Sessions Court was unable to specify the section under which he would convict, but found that all three prisoners were guilty "of having beaten the deceased Tariffullah so as to make his death very probable."

The other assessor found all three guilty under section 304 of the Indian Penal Code.

The Judge, however, disagreed with both assessors, and found the prisoners guilty of murder under section 302, and sentenced them to transportation for life.

Against this conviction and sentence the prisoners appealed to the High Court, on the ground that the depositions taken before the Magistrate ought not to have been used before the Sessions Court, as the prisoners had been deprived by the refusal of the Magistrate to allow their vakeels to appear, of the right of cross-examination.

Baboo Kali Churn Banerjee appeared for the Appellants.

The judgment of the Court (1) was delivered by

JACKSON, J. :—

JACKSON, J.

The principal part of the evidence in this case—in fact the only

(1) JACKSON and TOTTENHAM, J.J.

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In re

DHAM  
MUNDUL.

Judgment.

JACKSON, J.

material part of the evidence—is that of the witness Nikjan and her husband, and the witness Musa. These persons before the Magistrate deposed very clearly to facts which can leave no doubt whatever as to the guilt of the persons charged, and in fact completely made out the case for the prosecution against them. But these persons, when called as witnesses in the Court of Sessions, made statements entirely different from what they had made before the Magistrate, in fact repudiated those statements. Only one of them admitted that he had made those statements but under pressure. The Sessions Judge, thereupon, under the power vested in him by section 249 of the Code of Criminal Procedure, as amended by section 20 of the Amendment Act, used the previous depositions of these persons as evidence in this case, and it is objected before us that those depositions ought not to have been so used because they were given without cross-examination in consequence of the committing Magistrate having refused to allow pleader to appear before him on behalf of the accused. There can be no doubt that such an application was made before the Magistrate, and that he, at any rate, discouraged, if he did not absolutely, refuse to allow pleaders to appear before him, and the Sessions Judge, adverting to this circumstance, has pointed out that the Magistrate therein acted in direct contravention of section 186 of the Code of Criminal Procedure. Now, as to this objection I observe that it is not taken before us precisely in the same form as it was urged in the Court of Session. It does not seem to have been seriously contended before the Court of Session that what the Magistrate did had deprived the prisoners of the benefit of cross-examination. All that was said there was, that the depositions ought not to be used because they were not duly taken in the presence of the accused persons, and it seems to have been contended or suggested that because the accused persons were there in *propria persona*, and were not represented as they desired to be, by pleaders, they were not regularly present, and the evidence was not duly taken in their presence. However, putting that aside, we are inclined to think that there is really no force in the objection. It does not appear that the pleaders who were retained by the accused made any attempt to cross-examine the witnesses, for they might have

suggested to the accused the proper questions to be put to the witnesses: nor in fact are we disposed to think that at that stage of the proceedings, cross-examination, if resorted to, would have been of any benefit to the accused. Very probably it would not, the Court thinks, have been resorted to at all. Then the question is, ought the evidence to be believed as it stands? The Court is of opinion that it is so probable, so consistent with what the Judges know to be the condition of life amongst Mahomedans of the lower classes in the Eastern districts, that it can in the main be believed, and what has since taken place, viz., that influence has been brought to bear upon the witnesses with a view to closing their mouths, confirms us in the belief. We therefore have no doubt that the statements of the witnesses, made before the Magistrate, are in substance true; that the accused persons did actually kill the deceased Tariffullah; and that it was his body that was found as described. The Court have then to consider whether the offence is murder. Regard being had to the nature of the evidence given, and to the declaration made by the accused at the time when the assault was made, we think it probable that they did intend some bodily injury which was likely to cause death. We, therefore, cannot shrink from the conclusion that the offence was murder, and therefore, as a Court of Appeal, we are bound to affirm the conviction and the sentence of the Court below.

1880

In re

DHAM  
MUNDUL.

Judgment.

JACKSON, J.

## [CIVIL APPELLATE JURISDICTION.]

1880  
Feb. 10th.

No. 35 of  
1879.

BROJOMOHUN DOSS AND OTHERS (PLAINTIFFS) APPELLANTS;

AND

HURROLOLL DOSS . . . (DEFENDANT) RESPONDENT.

*Charitable or religious trusts under a will, Suit to enforce—Parties entitled to sue—Plaint, necessary allegation in.*

The representatives of a testator are entitled to sue for the enforcement of the due performance of trusts created by him for religious and charitable purposes, and in which they are not personally interested, but their suit will be dismissed, unless upon their plaint they substantially allege a state of circumstances, which, if proved, will constitute a distinct breach of trust.

Where such a suit is brought, the plaintiffs ought to be required to give security for costs.

**A**PPPEAL from a decision passed by Mr. Justice WILSON, on the 22nd May 1879.

In this case the plaintiffs, sued the defendant, (who was the executor) to have the will of one Chuneeloll Doss, deceased, construed; for a declaration of the rights of all parties interested thereunder, and in the estate of the deceased; and for a settlement of a scheme for the performance of the trusts mentioned in the will.

The trusts were these:—After payment of Rs. 5 per month to defray the expenses of the daily service of the idol, to pay and spend in every festival and holiday a sum proportionate to the extent of the property, also to pay certain legacies, and after payment of debts and legacies in the will mentioned to hold the residue of the property, and thereout entertain and feed Brahmins on the anniversary of the demise of the testator's father and mother, and also to perform his Shrad and other acts for the repose of his soul annually, and to carry on the worship of the deities.

It was alleged generally, that the executor used the rents of the immoveable property for his own purposes; that he did not properly carry on the worship of the idol as directed by the will; and

that he did not carry out any of the other acts mentioned in the will.

After hearing the evidence, Mr. Justice WILSON delivered the following judgment :—

"I think the plaintiffs have made no case \* \* \* \* \*

In the first place it is necessary to establish that these trusts are valid. As to that I express no opinion. In the second place it must be shown that the plaintiffs are sufficiently interested to entitle them to have those trusts carried out. As to that also I express no opinion. In the third place some ground must be shown why the Court should intervene, and why the powers of management which the testator has entrusted to trustees should be taken away from them. No such ground has been shown. It has not been shown that the executor does not entertain and feed Brahmins. As to the Shrads it is said indeed that the plaintiffs were not invited to attend them. But it is not shown that they ever claimed or offered to be present, or to perform them. Then it is said that the worship is not performed on the proper scale. But there is really no evidence that the executor does not properly carry on the worship of the idol either daily or periodically; and for twenty years the plaintiffs have found nothing in this to complain of.

I am of opinion plaintiffs have made no case on the ground of breach of trust. They however put their case in another alternative way. They say if the trusts are invalid, or the property not exhausted, they are entitled as heirs of the testator. In my opinion, having regard to the cases cited, it is clear that any claim of that sort is barred by limitation. The suit must therefore be dismissed.

The plaintiffs appealed against this decision.

*Paul*, (Advocate-General), *Kennedy* and *Bonnerjee*, for the Appellants.

*Phillips* and *T. A. Apar*, for the Respondent.

The judgment of the Appellate Court (1) was as follows :—

In this case we agree with the opinion of the lower Court, that even if the plaintiffs have proved themselves to be the heirs of the testator, they are excluded by his will from taking any interest in his estate. The will devotes his estate to religious and charitable trusts exclusively.

But the plaintiffs have argued before us, that even if they have no personal interest, still they are entitled, as heirs, to see that the

(1) GARTH, C.J., and PONTIFEX, J.

1880  
BROJOMOHUN  
DOSS  
v.  
HURROLOLL  
DOSS.  
—  
Judgment  
—



1859  
 BROOKMONT  
 Dees  
 v.  
 HURBOLLO  
 Dees.  
 Judgment.

religious and charitable trusts are properly carried out, inasmuch as there is no one else to put the Court in motion, and thus obtain the due administration of the trusts.

It has never yet, we believe, been decided that the representatives of a testator are entitled to sue for the enforcement of trusts created by him for religious or charitable purposes, but in which they are not personally interested. In England the due administration of charitable and religious trusts is enforced by the information of the Attorney-General at the relation of some private individual; but in this country there is no public officer endowed with such a faculty. As it would lead to great abuse in trusts of this nature, unless some person was able to bring them under the control of the Court, and as in this country there is no properly-constituted authority for the purpose, we should, as at present advised, be disposed to hold that the representatives of a testator, who had created such a trust, are the persons who would be entitled, if a proper case were made out, to institute proceedings for the purpose of having abuses in the trust rectified; but with the qualification that it would be inadvisable for a Court to admit a suit of this nature, unless the plaintiff gave sufficient security for costs, in the same way as the Attorney-General in England would refuse to allow his name to be used to an information, except at the instance of a responsible relator.

But assuming that the plaintiffs in this case are the representatives of the testator, and as such entitled in a proper case to enforce the due performance of the trusts, the question remains whether they have made such a case.

Now it seems to us that the principal motive of the suit was to obtain a declaration, that they had some personal interest in the testator's estate, and that in this they have failed.

They now desire to go beyond this, and to obtain a decree for the administration of the trusts.

They do, indeed, by their plaint raise a case of suspicion; but in our opinion that is not enough to entitle them to a decree for an account. Of course if they were personally interested under the will, or in the estate, they would, as of right, be entitled to an account against the executor or trustee.

But that is not their position. The decree which they now

ask for, they solicit in the interests of the charity, and not in their own interest; and to be entitled to such a decree we think it is not sufficient for them to make out a case of mere suspicion, or to rely on particular passages of the defendants' written statement. They must allege substantively in their plaint, that which must be a distinct breach of trust, whatever construction may be put upon it, to entitle them to a decree.

As Lord COTTENHAM said in *Attorney-General vs. Mayor of Norwich*, 2 Myl. and Cr., 423-4:—"So strongly was it felt indeed that there might be cases in which the corporation would be justified in making these payments, that Sir William Follett, in his reply, was driven to use this argument, that if any particular circumstances did exist, it was for the defendants in their own justification to state and explain them in their answer, and that it was sufficient for the relator to make a *prima facie* case. That is contrary, however, to the known and established rules of pleading. It is for the plaintiff to allege the grievance of which he complains; and if he does not in his record sufficiently allege it, the defendant is not called upon to answer at all. If the case, as stated in the record, brings before the Court allegations in which two constructions may be fairly put, one consistent with the innocence of the defendant, and the other implying a breach of trust in his part, it is contrary to all the rules of pleading to presume that that is wrong which the plaintiff has not thought proper to allege as wrong, by not setting forth those circumstances which are necessary to make it so."

We observe that in this case the defendants, by their written statement, have expressed their readiness to account; but we think that in a case like the present the plaintiffs are not entitled to pick out passages from the defendant's written statement to supplement the weakness of the case made by themselves. And as, in our opinion, the plaintiffs have failed to allege a sufficient case for the interference of the Court, we must affirm the decision of the Court below, and dismiss the appeal with costs. But we do so without prejudice to the institution of any properly constituted suit against the defendant, leave to institute which we reserve, if it is necessary to do so.

1880  
BROJOMOHUN  
DOSS  
v.  
HURROLOLL  
DOSS.  
—  
Judgment.  
—

## [CIVIL APPELLATE JURISDICTION.]

1880  
Feb. 13th  
No. 2438 of  
1878.

SUPUT SINGH AND OTHERS (DEFENDANTS) ... APPELLANTS;  
AND  
IMRIT TEWARI AND OTHERS (PLAINTIFFS) ... RESPONDENTS.

*Civil Procedure Code (Act X of 1877), section 32—Parties added—  
Limitation—Contribution—Wrongdoers.*

Where the original plaintiffs, before the issue of the summons in the suit, assign their interest in such suit, and the assignees are made parties plaintiffs, limitation runs from the date of the plaint, and not from the time when the assignees were made parties.

In a suit for damages where a joint decree has been obtained, there is a right of contribution among the defendants *inter se*, only if the wrong complained of were committed under a *bona fide* claim of right. In such a case the Court, where a suit is brought for contribution, is bound to enquire what share each defendant in the former suit took in the transaction upon which it was based, in order to determine in what proportions contribution should be allowed.

*Sreeputty Roy vs. Loharam Roy*, 7 W. R. (F.B.) 384 cited.

**A**PPEAL against a decision passed by the Subordinate Judge of Gya, affirming a decree of the First Sudder Moonsiff of that District.

The original plaintiffs in this case were the four sons of one Agid Tewari. They filed their suit on the 14th December 1877, but on the 22nd of March Syed Muhrun Hosain and Sarup Singh, who had meanwhile purchased their interest in the suit were added as parties, and the summons and other proceedings were issued and taken in their, and not the original plaintiffs' names.

It appears that one Umnat Russul brought a suit against the four original plaintiffs and the defendants in this case and one Gopal Tewari, to recover the price of 122 palm trees, and on the 5th of March 1878 obtained a decree against them for Rs. 872-2. The proportionate amount payable by the four original plaintiffs in this suit, having regard to the number of the defendants in the former suit, was Rs. 384-9; but fearing lest the

property might be put up for sale, on the 17th July 1874, they paid Rs. 200, and on the 15th December 1874 the balance of <sup>1880</sup> SUPUT SINGH v. IMRIT TEWARI. Judgment.  
Rs. 677-2 into Court.

The present suit was for contribution, and it was sought to recover the amount paid in excess of what was the proportionate share of those who had made the payments.

The Moonsiff gave the plaintiffs a decree against each of the defendants for an aliquot share of the amount claimed, and this decree was confirmed on appeal by the Subordinate Judge.

Some of the defendants appealed to the High Court.

Mr. M. L. Sandel, for the Appellants.

Baboo Joy Gopaul Ghose, for the Respondents.

The judgment of the Court (1), which was as follows, was delivered by

GARTH, C.J. :—

GARTH, C.J.

The first point raised by Mr. Sandel on behalf of the appellant is, whether limitation does not apply to the whole of the plaintiff's claim.

It appears that the suit was brought on the 14th of December 1877 by Imrit Tewari, Kolopur Tewari, Harihar Tewari, and Jhinga Tewari, who had paid the whole of the damages decreed against them and other defendants in a former suit for cutting down some trees growing upon land, of which they were the tenants.

After the plaint had been filed, and before the summons to the defendants had been issued, the plaintiffs assigned their interest in the present claim to certain other persons, named Syud Mohurram Hossein and Sarup Singh, and it seems that the summons to the defendants, issued in the names of those persons, (the assignees) and not of the original plaintiffs in the suit. It also appears that at the time when the assignees' names were first introduced into the proceedings, the claim would have been barred by limitation.

It has been held by both the lower Courts that the suit is not barred, because they consider that section 22 of the Limita-

(1) GARTH, C.J., and MITTER, J.

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tion Act ought to be read with section 32 of the Code of Civil Procedure; and that reading those sections together, this case does not fall within the meaning of section 22 of the Limitation Act.

*Judgment.* It has now been contended by Mr. Sandel, that although the original plaintiffs might have been the proper persons to sue in the first instance, and although they might have been the trustees for the persons to whom they afterwards assigned the claim, still as the defendants were summoned to answer the suit of assignees, limitation ought to be reckoned as from the time when those persons were first made parties to the proceedings.

GARTH, C.J.

We think that this is not so; and that the case is one, to which section 32 of the Code of Civil Procedure is not properly applicable.

In the first instance, the original plaintiffs were the only persons who could institute the suit; and when they afterwards assigned their interest, it was perhaps not necessary for the persons, to whom they assigned it, to become parties at all; but if they did so, they would only continue the suit, not in substitution, but in conjunction with, and as the representatives in interest of, the original plaintiffs; and that it was merely a mistake in form to have summoned the defendants at the suit of the assignees. We think, therefore, that under the circumstances the suit is in time.

Then another question of limitation has been raised, which appears to us entitled to more weight; and that is, that the payments made by the original plaintiffs, in respect of which they now sue for contribution, were made at two different times.

A sum of Rs. 200 was first paid by them to the plaintiffs in the former suit on the 17th of July 1874; and as to this it is contended that the plaintiffs are not entitled to recover contribution, because they did not bring this suit within three years from that date.

Now the rateable proportion which the plaintiffs ought to have paid, assuming that each of the persons who were made liable under the former decree, were bound to contribute equally to the amount awarded, would be about Rs. 76; and Mr. Sandel con-

tends, that as regards the difference between Rs. 76, and the sum of Rs. 200 paid on the 17th July 1874, the plaintiffs, even assuming that they are entitled to sue at all, are barred from recovering contribution.

This would, of course, depend upon the further question which has also been argued by Mr. Sandel, and which we shall deal with presently, viz., whether the persons against whom the original decree was made are bound to contribute equally, or to any or what extent, to the sum decreed in the former suit; and this is a point which the Court below, when the case comes before it again, will have to take into consideration.

But the first and the main question is, whether, as between the persons against whom jointly the decree in the former suit was pronounced, there is any right of contribution at all, and this depends (according to the rule laid in the Full Bench case to which we have been referred—*Sreeputty Roy vs. Loharam Roy* 7 W. R., 384), upon the question, whether the defendants in the former suit were wrong-doers in the sense that they knew or ought to have known, that they were doing an illegal or wrongful Act.

In that case no suit for contribution would lie; (see also *Merryweather vs. Nixan* 8 T. R., 186; 2 Smith's L. C., 546: and *Fairbrother vs. Ansley*, 1 Camp 344.)

But on the other hand, if the defendants in the former suit were not guilty of a wrong in that sense, but acted under a *bonâ fide* claim of right, and had reason to suppose that they had a right to do what they did, then no doubt they might have a right of contribution *inter se*; and in such case the Judge in the Court below was bound to enquire what share each took in the transaction; because, according to circumstances, one or more of them might be excused altogether or in part from contributing; as for instance, (to use an illustration put by Sir BARNES PEACOCK), one of them might have acted as the servant, and by the command of the others, or the others might have been the only persons benefited by the wrongful act; in which case those who were alone benefited, or who ordered the servant to do the act, would not be entitled to contribution.

It is, therefore, necessary, that the case should go back to the Court of First Instance, in order that it may be ascertained what

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were the circumstances of the former suit, and what was the nature of the wrongful act of which the defendants were found guilty; and if the wrong was of such a nature as to justify a suit for contribution, then it must be further ascertained what part these defendants took in the matter, and whether they ought to contribute at all, and in what proportions.

Mr. Sandel appears to have offered very fair terms of compromise to his opponents, which it may be very wise for them to accept; but unless the matter is so settled within a fortnight from this date, the judgments of both the lower Courts will be reversed, and the case will be remanded to the First Court for retrial, having regard to the foregoing observations.

The costs will abide the ultimate result.

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[CIVIL APPELLATE JURISDICTION.]

*March 18th.* FAKIRA DOBEY . . . . . (PLAINTIFF), APPELLANT;  
 No. 3 of 1879. AND  
 GOPI LAL . . . . . (DEFENDANT) RESPONDENT.

*Hindu Law—Alienation by widow of houses built from income of husband's estate.—Widow, Alienation by.*

A Hindu widow has no power to sell a house erected by her out of savings of her income on land inherited from her husband.

**A**PPEAL from a decision passed by the District Judge of Tirhoot, modifying a decree of the Subordinate Judge of that District.

This was a suit by one of the reversionary heirs of Kishen Jewan Dobey, to recover possession by adjudication of right in respect of a one-third share of a pucca house containing two shops, and a pucca Zenana house, and to have a Kobala, dated 30th February 1870, by which Mussamut Ram Peary Dobain, widow of Kishen Jewan Dobey, had sold and conveyed the same to the defendant.

It was found there was no legal necessity for the sale. The two pucca shops had been built by the widow from the current income derived for her husband's property.

The Subordinate Judge, on the authority of *Sreemutty Puddomoni Dossee vs. Dwarkanath Biswas*, 25 W. R., 335, and *Grove vs. Amirtomyi Dassee*, 4 B. L. R., 40, held that the alienation of the two shops, even though the object was to convert them into money to be expended at her own discretion and for her own purposes, was a perfectly legal transaction.

So far, therefore, as the house containing the two shops was concerned he held (reversing the decree of the lower Court), that the Kobala in question was valid.

The plaintiff appealed to the High Court.

Baboo Mohesh Chunder Chowdhry, and Baboo Aubinash Chunder Banerjee, for the Appellant.

Baboo Sreenath Banerjee, for the Respondent.

In argument the following cases were cited *Golab Singh vs. Rao Kurun Singh*, 10 B. L. R.; *Musst. Bhagbuth Dace vs. Chowdhry Bholanath Thakoor*, L. R. 2 I. A. 256; *Katama Natchiar vs. The Zemindar of Shivagunga*, 9 Moore I. A., 539.

The judgment of the High Court (1), which was as follows, was delivered by

PONTIFEX, J.:—

PONTIFEX, J.

The circumstances of this case are as follows;—Mussamut Ram Peary Dobain, widow of Kishen Jewan Dobey, out of the profits of her husband's estate, erected a certain pucca house, and one of the questions in the case is whether she had power to sell that pucca house during her lifetime. This might raise a question of very considerable difficulty, as there has been a conflict of authorities with respect to a widow's power to deal with purchases made from the income of her husband's estate. But before that question really arises, it seems to us there is another question that ought to have been tried. The plaintiff in his plaint alleges that the whole of the property, including the land on which the pucca house was built, passed into the hands of Mussamut Ram Peary Dobain, from her husband as mourosi milkeut. The defendant in the second paragraph of

• (1) PONTIFEX and McDONELL, J.J.

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*Judgment.*  
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his written statement denies that the land is mourosi property. One of the issues raised by the Subordinate Judge was "whether the house in question belonged to Kishen Jewan Dobey, or it was exclusively built by Mussumut Ram Peary; if the latter, had the Mussamut any right to alienate the same?"

Now, that issue is not sufficiently precise. The additional issue ought to have been framed whether the pucca house in question was built by the Mussamut on land that formerly belonged to her husband Kishen Jewan Dobey.

We are of opinion that if the Mussamut had built this house out of the savings of her income on land inherited from her husband, she would, in that case, have no power to alienate. That question unfortunately has not been tried. We therefore think it necessary to send the case back to the Lower Appellate Court for the trial of the above issue. The parties will be at liberty, if they desire it, to produce fresh evidence on this point. This point was not in reality raised by the grounds of appeal to this Court, because the appellants believed that apart from that question they would be entitled to have the decision of the Court below set aside on the question of law that has been raised. It is not necessary for us to decide that point of law until this question of fact has been decided.

We wish to repeat, that if it is found that the land on which this house was built was the land of Kishen Jewan Dobey, the decree of the Lower Appellate Court must be set aside and with costs; but if, on the other hand, it is found that the land on which the house is built was not the land of Kishen Jewan Dobey, then the Lower Appellate Court will send up its finding to this Court in which case we reserve the question of the costs of this Court.

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## [CIVIL APPELLATE JURISDICTION.]

KESHO PERSHAD AND OTHERS (JUDGMENT-

DEBTORS) . . . . . APPELLANTS ;

AND

HIRDAY NARAIN (JUDGMENT-CREDITOR) . RESPONDENT.

No 383 of  
1876.

*Ex-parte decree, Application to set aside—Act VIII of 1859, section 119—Act X of 1877, section 108—“Sufficient cause for not appearing”—Guardian, non-appearance of.*

An *ex-parte* decree having been granted in a suit against A personally and as guardian of her infant sons, the infants subsequently applied under section 119 of Act VIII of 1859 to set aside the decree, on the ground that the summons had not been duly served. It was proved that the summons had been duly served upon A, and the application was dismissed.

On appeal to the High Court, *held*, that although so far as the decrees made A personally liable, the Court had no power to interfere, yet as the infants were not responsible for their non-appearance, it might be said that they had been prevented by “sufficient cause from appearing,” and that the decrees might be set aside under section 119 of Act VIII of 1859 (cf. Act X of 1877 section 108) as against them.

**A**PPEAL from a decision passed by the First Subordinate Judge of Bhaugulpore, on the 13th November 1876.

In this case an application was made under section 119 of the Civil Procedure Code of 1859, to set aside an *ex-parte* decree obtained against Mussamut Ghonshan Koeree personally and as guardian of her two infant sons, Kesho Pershad and Nund Kishore Pershad.

Mussamut Ghonsham Koeree alleged as the ground of the application that the summons had been duly served upon her, and in support of her allegation she called three witnesses. Two of these, who were her own servants, supported her assertion. The other was the chowkidar of the village, but he deposed to the service of the summons. The serving peon was called by the other side and gave evidence of his having duly served the

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—  
*Judgment.*  
—

summons. The Subordinate Judge was of opinion that the due service of the summons had been clearly proved and dismissed the application.

Baboo *Doorga Das Dutt*, for the Appellants.

Mr. *R. E. Twidale*, for the Respondent.

The judgment of the High Court (1) was as follows :—

In this case, so far as these two decrees made the mother herself personally liable, we have no power to interfere. The summons having been duly served upon her, we have no reason to suppose that she was prevented by any sufficient cause from appearing and defending her own suit, it being entirely within her control whether she would appear or not.

But as regards the minors, we think the case stands differently. It may be that the formality of serving the summons was, as regards them, duly followed. But we think that we may legally and fairly deal with this matter as regards the minors under the clause which provides that if the defendant be prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court should pass an order to set aside the judgment. It is not to be expected that the defendants themselves could have appeared in person, and they had a right to expect that their lawful guardian would take the proper, and what in this case was obviously a necessary, step to protect their interest. By a neglect of duty for which they are not in any way responsible, no one appeared on their behalf when the case was called on. We think it would be contrary to justice to hold that they are responsible for their non-appearance. We think they have a right to say in the words of the Act, that they have been prevented by sufficient cause from appearing when the case was called on. That being so, whether the summons was served or not, the Court below had power to set aside these decrees. That view of the matter seems to have been overlooked by the lower Court, otherwise probably it would have made the order to set aside the decrees. Accordingly we now make that order, that so far as regards the minors, these

(1) MARKBY and MITTER, J.J.

two decrees be set aside, and the case will be remanded to the lower Court to be proceeded with as against them in the usual way. As regards the lady herself, the decrees will stand.

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We must bring it to the attention of the Court below that it is the duty of the Court to see that the interest of the minors are protected, and that the guardian is properly protecting the interest of the minors under his care.

Each party will pay their own costs of these appeals.

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[PRIVY COUNCIL.]

MANWAR ALI . . . . . APPELLANT ;

AND

UNNODA PERSHAD ROY . . . . . RESPONDENT.

1879  
Nov. 14th.

*Limitation Act (IX of 1871), Schedule II, Art. 145—Adverse possession—Judgment—Appeal.*

In 1839 a butwara was made of an estate which up to that time had been held jointly in the following shares :—the plaintiff 10 annas his father 2 annas, and his brother the remaining 4 annas, and under the butwara different villages were distributed, each party taking certain specified villages as his share. In 1842 the father died, his share having in the meantime, in some way, become vested in the plaintiff. In 1856 execution was issued against the 4 annas share of the plaintiff's brother, who resisted the execution, and in 1858 a suit was instituted by the judgment-creditor to enforce his rights, the present plaintiff being joined a defendant with his brother. In this suit it was decided, in 1860, that the butwara was not binding on the judgment-creditor, and that he was at liberty to take a 4 annas share of the rents of all the villages divided under the butwara, and in 1863 this judgment was, on appeal by the brother, affirmed. The decree was not executed till July 1864.

In 1873 the plaintiff filed the present suit to establish his right to receive his 12 annas share.

*Held*, that there was no adverse possession against the plaintiff until the appeal in the other suit was dismissed in 1863, and, therefore, that the suit was not barred.

*Per curiam*.—It cannot be said that the plaintiff was bound to assert his right, in 1860, because S. (the brother) having appealed against the decree there was a possibility of its being reversed or altered.

[Judgment of the High Court reversed.]

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 PERSHAD  
 ROY.  
 Judgment.

**A**PPEAL from a decision passed by a Divisional Bench (MACPHERSON and MORRIS, J.J.) of the High Court of Calcutta, on the 22nd February 1876.

*Doyne*, for the Appellant.

*Leith, Q.C.*, and *C. W. Arathoon*, for the Respondent.

The facts will be found in the judgment of the Judicial Committee (1) of the Privy Council, which was as follows :—

The facts of this case are complicated, but when fully stated and explained they do not appear to their Lordships to present any great difficulty. The first, if not the only question, on the appeal is, whether the plaintiff's right to sue has been barred by the statute of limitation. That was the only question decided by the High Court, and their Lordships may at once say that if that has been improperly decided, they can see no ground whatever for doubting the correctness of the decision of the lower Court, which, upon the other material issue in the suit, held that there was no pretence for saying that the lands in dispute were not khalisha lands, that is, lands appertaining to the zemindary, but lakhiraj lands held under some title other than that of the zemindars. The facts are shortly these :—The estate in question, which is a fractional part of Pergunah Surial, was derived from a Mahomedan lady by her husband and two sons, and was held by them in the following proportions : the plaintiff, who was one of those sons, had a 10 annas share, his father had a 2 annas share, and his brother, or half-brother Sumdal, had a 4 annas share. Their enjoyment of the property was, up to the year 1839, what has been termed *ijmali* or joint, that is, they divided the rents of each village in proportion to their abovementioned shares in the estate. In 1839 the family arrangement, which has been called a *butwara*, is said to have taken place. Their Lordships see no reason to doubt that such a transaction did take place. Under it the different villages constituting the estate were divided, the plaintiff taking solely

(1) Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

certain specified villages as his 10 annas share, and his father and Sumdul taking jointly certain other villages which were allotted to them as representing a 6 annas share. That state of things seems to have continued, and to have been acted upon up to the year 1856. In 1856 Sumdul being in embarrassed circumstances, an execution issued against his 4 annas of the estate at the suit of one Nusiruddin. It should be mentioned, however, that before this, Munsur Ali, the father, had died in February 1842, and that in different ways his 2 annas had come to be vested in the plaintiff, so that at the time of the execution the elder brother, the plaintiff, had a 12 annas share, and Sumdul only a 4 annas share in the zemindary. There seems to have been the usual resistance to execution on the part of Sumdul, and a suit was brought by Nusiruddin, who was execution-purchaser as well as judgment-creditor, in the year 1858 to enforce his rights. The first judgment in that suit was pronounced on the 3rd December 1860. It was a judgment of a somewhat peculiar character. Nusiruddin had brought the suit, not only against Sumdul, and certain persons in whom Sumdul alleged his 4 annas had become vested prior to the execution, but also against the present plaintiff, the owner of the 12 annas share, and it was decided not only that the 4 annas share had continued to be the property of Sumdul at the date of the execution, and had passed under the sale in execution, but further that the family arrangement or butwara, which had been acted on so long, and had been pleaded by the plaintiff, had not been proved against, and was not binding upon, Nusiruddin, and that he was accordingly entitled to hold the 4 annas of Sumdul, purchased by him in *ijinali* enjoyment with the plaintiff. The High Court has held that the right of the plaintiff, to assert the rights which he has asserted in this suit, accrued to him at the date of this decree, and that therefore the decree having been passed in 1860, the present suit, which was instituted on the 17th September 1873, is out of time.

It appears that Sumdul, but not the plaintiff, appealed against the decree, and that his appeal was not finally disposed of till the 19th June 1863. Execution was then taken out by

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 ROY.  
 Judgment.

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 PRASHAD  
 ROY.  
 Judgment.

Nusiruddin against Sumdul, but there were fresh delays, and the heirs of Nusiruddin, who had died in the meantime, did not obtain constructive possession of Sumdul's 4 annas until July 1864. Sumdul then set up a title to hold as lakhiraj the lands in question in this suit, which had formed part of the villages allotted by the butwara as the 6 annas share, treating them as no part of the *khalisha* lands, his interest wherein had passed under the execution.

It appears to their Lordships, that this, or at all events, the date of the dismissal of the appeal, is the earliest at which it can be said that the title of the plaintiff to the relief which he seeks in the present suit accrued. The effect of the decree in Nusiruddin's suit in so far as it set aside the partition, was to give to him a right to take from the plaintiff 4 annas of the rents of all the villages previously allotted to him, and to give to the plaintiff a corresponding equity or right to have the 12 annas of the rents of the villages which had formerly belonged to Sumdul. It cannot, their Lordships think, be said that the plaintiff was bound to assert this right in 1860, because Sumdul having appealed against the decree there was of course a possibility of its being reversed or altered, and of Nusiruddin's suit being dismissed altogether. It was, therefore, uncertain against whom the right to receive the 12 annas share of the villages in question was to be asserted; nor did it follow that because the butwara or family arrangement had been declared to be of no effect as between Nusiruddin and the present plaintiff, it was of no effect as between the plaintiff and his brother, who were co-defendants in Nusiruddin's suit. Again, it appears that no attempt was made by Nusiruddin to take out execution pending the appeal, and it may fairly be supposed that by arrangement between the brothers there was an agreement that the property should continue to be enjoyed as it had been under the partition. In these circumstances it seems to their Lordships that even if technically the lands now in question remained, pending the appeal, in Sumdul, there was no necessity or duty lying upon the plaintiff to assert his rights in those lands until Nusiruddin's heirs were put into possession, or at all events until the rights of the parties had been finally determined by the

dismissal of the appeal. These considerations are alone sufficient to bring the plaintiff's suit within the twelve years, and to dispose of this question of limitation. The provision of the Act of 1871, which seems to their Lordships to govern the case, is the 145th Article of the second Schedule, which says that the time from which the period of twelve years is to be calculated is that when the possession of the defendant, or of some persons through whom he claims, became adverse to the plaintiff. Their Lordships think, for the reasons above stated, that there was no possession adverse to the plaintiff before 1863. A question has been raised at the bar whether the possession, adverse to the plaintiff, did not really begin when Sumdul, driven to his last shift, and unable to resist the execution on the part of Nusiruddin against his zemindary interest, first set up the claim to the lands in question in this suit as lakhiraj lands, held by a title other than his zemindary title, and therefore capable of being held by him, although all his interest in the zemindary had passed away. There is some evidence on the part of the plaintiff that the ijaradars of his two annas interest in those lands were then actually and forcibly dispossessed under colour of this title. It is not, however, necessary to decide this question. It is sufficient to say that their Lordships cannot concur with the High Court in thinking that the twelve years are not to be calculated from the 3rd December 1860, or from any time previous to the year 1863.

It has already been intimated that in their Lordships' opinion the defendant has wholly failed to establish a title as lakhirajdar to the lands in question. Their Lordships must, therefore, humbly advise Her Majesty to allow this appeal, to reverse the decree of the High Court, and in lieu thereof to order that the appeal to that Court be dismissed, and the decree of the Subordinate Judge affirmed with costs.

The appellant will also be entitled to the costs of this appeal.

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*Judgment.*



## [PRIVY COUNCIL.]

1880. IMRIT KONWUR AND ANOTHER . . . . . APPELLANTS;  
 March 15th. AND  
 ROOP NARAIN SINGH . . . . . RESPONDENT.

*Hindu Law—Compromise of Suit by widow—Adoption—Evidence.*

IN a suit in which a claim was made, in virtue of an alleged adoption, to the estate of a deceased Hindu, the widow made a compromise, which was not in writing, with the claimant, wherein the adoption was admitted, but alleged to have been on condition that the widow should enjoy the entire property for her life without power of alienation, and that, after her death, her minor daughters should take the self-acquired property, and that the claimant should succeed to the ancestral estate.

*Held*, that the daughters could not under any circumstances be bound by the compromise. The evidence to establish such a conditional adoption, as that alleged, must, as in the case of a nuncupative will, be very strong.

Judgment of the High Court reversed on the facts.

**A**PPEAL from a decision passed by a Divisional Bench of the High Court at Fort William in Bengal, reversing a decision of the Subordinate Judge of Tirhoot.

The facts are sufficiently set forth in the judgment of their Lordships of the Judicial Committee (1), which was as follows:—

The plaintiffs in this case, who are the appellants, are the daughters of Baboo Perdip Narain Singh, who died on the 1st May 1857, without male issue. They sued as his heiresses in reversion after the death of Mussamut Baneshur Konwur, his widow who died on the 27th November 1873. The lands in respect of which the suit was brought are situate in the district of Tirhoot, in which the Kritima form of adoption is allowed. The defendant claimed as the adopted son of Perdip Narain, under the Kritima form. In his written statement, after alleging

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the adoption, he proceeded to state that Perdip Narain established him, the defendant, as the proprietor of his entire estate and with his consent directed that Mussamut Baneshur Konwur should hold possession of the entire estate during her lifetime, and enjoy the profits thereof with this limitation, that she should have no power to transfer or give away the property, and that after her demise the ancestral and moveable property should be put into possession of the defendant and the self-acquired property should pass to his daughters, and that after this he gave some instructions as to the marriage of his daughters. The defendant was about eighteen years of age at the time of the alleged adoption. If he was not adopted the plaintiffs are the undoubted heiresses by birth of Perdip Narain. They ought not to be disinherited except upon clear proof of the adoption.

The Subordinate Judge of Tirhoot, who in the first instance heard the case, disbelieved the evidence in support of the adoption and decreed for the plaintiffs. The High Court upon appeal considered that the reasons given by the Subordinate Judge were unsatisfactory and reversed his decision. The question for the determination of their Lordships is whether there are sufficient grounds for setting aside that reversal. The Subordinate Judge considered that the adoption as set up by the defendant was improbable, and also inconsistent with the acts and conduct and statements of the defendant.

Perdip Narain was a cousin of Odit Narain, the father of the defendant. They had originally been joint in estate and had held ancestral property, but they had some years previously to Perdip Narain's death separated. Perdip Narain had held his share of the ancestral estate, and was also in possession of self-acquired property. One of the grounds upon which the Subordinate Judge considered that the case of the defendant was inconsistent with his former statements was that in a petition of the defendant he had stated that the family had been reunited, and that on Perdip's death, he, the defendant, had succeeded to the estate by survivorship, the deceased having left no son; that he came into possession of the estate, and was, in fact, in possession of it from the time of Perdip Narain's death and that his brother was never in possession. The learned Judges of the

1880  
IMRIT  
KONWUR  
v.  
ROOP NARAIN  
SINGH.  
Judgment.

1855  
 —  
 HENRY  
 KERRICK  
 v.  
 ROSE JARAIN  
 SINGH.  
 —  
 Judgment.  
 —

High Court after examining the petition referred to, considered that the Subordinate Judge was wrong in his construction of it, and that the defendant did not allege that the family had been reunited. Their Lordships are not prepared to say, that the High Court were wrong in their construction of the petition. The learned Judges of the High Court made no remark as to the contradiction between the statement of the defendant in that petition and the allegation in his written statement that the widow held possession to the time of her death. The Subordinate Judge also relied on the delay which, according to the defendant's allegation in his written statement, occurred between the death of Perdip Narain and defendant's obtaining possession, he not having obtained possession upon the death of Perdip Narain, but only upon the death of the widow. The Subordinate Judge remarked that if the defendant had been the adopted son he would have taken possession on the death of the adopting father. The High Court in commenting upon that part of his judgment remarked that the delay was explained by the very nature of the adoption set up by the defendant, and the arrangement said to have been made by Perdip Narain at the time, that the widow notwithstanding the adoption was to remain in possession of the whole property during her lifetime. In that respect their Lordships think the High Court were correct. There was no improbability in the case as set up by the defendant arising from the fact of his not having acquired possession immediately upon the death of Perdip Narain.

The reasons above referred to, however, were only two of the grounds upon which the Subordinate Judge considered that the adoption set up by the defendant was improbable and inconsistent with former statements made by the defendant.

It appeared that the suit had been brought by one Mussamat Bibi Wasihan against Perdip Narain and Odit Narain. Odit Narain died on the 30th September 1854, and upon his death Mussamat Deo Soondur Konwur, his widow, presented a petition to the Court in which the suit was pending in appeal, by which she represented that her husband Odit had died, and that the defendant was his heir. She was quite correct in that respect, for the defendant was the son and heir of Odit Narain. She prayed

that the defendant might be made a party in the appeal case. Thereupon the usual istaharnamahs were published. Subsequently Perdip Narain died, and on the 4th June 1857, a petition was filed by the appellant in that suit of Bibi Wasihan, in which she stated that Perdip Narain, the second respondent, was dead, and that Roop Narain, the present defendant, was his heir. In consequence of that petition istaharnamahs were again published. Afterwards on the 31st July 1857, Baneshur Konwur, the widow of Perdip Narain, filed a petition to the effect that her husband died on the 27th Bysack 1264, corresponding with the 1st May 1857, leaving her, the petitioner, and two minor daughters, and that Roop Narain Singh the nephew, who was separate in mess, had no concern with the heirship of the deceased. After that, on the 24th October 1857, the defendant filed a petition to the effect that he was the Kurta-poottra of and nephew in joint mess with Perdip Narain, and that Baneshur, his widow, could not be his heiress. A refutation of that statement was filed on behalf of the widow. Up to that point therefore the widow of Perdip claimed on behalf of herself and her daughters, and Roop Narain claimed as the heir by virtue of an unconditional adoption. There was then a conflict between the widow of Perdip Narain and the defendant as to whether the defendant was the heir by adoption or not.

Nothing had been said by the defendant with reference to his having been adopted upon a condition or subject to an arrangement according to which the widow was to enjoy the whole of the property for her life. Such being the nature of the dispute between the widow and the defendant, a compromise was come to between them, and a petition was presented on behalf of each of them admitting that the defendant had been adopted upon condition that the widow was to enjoy the property for her life without a power of alienation, and that after her death the daughters were to take the self-acquired property, and that the defendant was to succeed to the ancestral estate, and that the names of both should be inserted in the appeal in the place of Perdip Narain. That compromise was acted upon by the Court. It was stated by one of the plaintiff's witnesses that the compromise on the part of the widow was extorted from her.

1880  
IMBIT  
KONWUR  
v.  
ROOP NARAIN  
SINGH.  
Judgment.

1880  
IMRIT  
KONWUR  
 v.  
ROOP NARAIN  
SINGH.  
Judgment.

He said (Record, p. 48) : " A compromise was made between Mussamut Baneshur, and Bachoo (another name for Roop Narain) ; Jeolall Singh and other persons, naming them, including Babu Dain Singh were present. Babu Dain Singh said to Baneshur, the widow : ' Do make compromise with Bachoo Singh on this condition that during your life the property will remain in your possession, and after your death the property will come in to the possession of Bachoo Singh.' Thereupon the Mussamut said, ' I do not agree to it.' Then they said, ' If you will not compromise in this way, we will drive you out of the house.' Then the Mussamut according to their instruction made the compromise and acknowledged the Kurtapoottra." Another witness, at page 52, line 10, said, " There was a dispute between Mussamut Baneshur Konwur and Bachoo Singh regarding the heirship. Bachoo declared himself as heir of Perdip Narain Singh and Mussamut Baneshur Konwur called herself as heir. At last there was a compromise between the said Mussamut and Bachoo Singh. The compromise was effected in these terms, that during her life the Mussamut shall remain in possession of the properties, and that after the death of the Mussamut the ancestral properties are to come into possession of Bachoo Singh and the purchased properties into the possession of the daughters of Perdip Narain Singh."

The Subordinate Judge found as a fact that the compromise was obtained from the widow by extortion, and he must, therefore, have believed the witnesses for the plaintiffs. The High Court remarked upon that finding that the daughters never set up the case of extortion (see p. 19 of the Record.) They say :—" With regard to this solehnamah" (referring to the petition of the widow) " the Subordinate Judge says that it was not Baneshur Konwar's free act and deed and that she had no right by it to prejudice the rights of her daughters. The first point has been made the subject of much argument before us, but it was certainly never the plaintiff's case that their mother had been coerced into filing the solehnama. The plaint is absolutely silent on the subject of coercion and all that the Subordinate Judge had to go upon so far was the statement of two of the plaintiff's witnesses to the effect that the relatives of Perdip urged Baneshur

Konwur strongly to file the compromise and threatened her in case of refusal." It is true that the daughters did not set up that the compromise had been obtained by extortion, but they said that the widow had repudiated it. They stated in their plaint, page 3, paragraph 2, that the solehnamah, that is, the petition of compromise put in on behalf of the widow, was obviously in excess of her power, and is in every way illegal, and that the defendant could not by virtue thereof assert any right with respect to the whole or any part of the property, nor could such document be adduced in evidence as against them. They further stated that the widow herself previously to and after the date of the solehnamah repudiated the pretension of the defendant, and that the defendant also not being satisfied with the solehnamah raised objection against it, and that his right and the basis of his right as set forth in the solehnamah were entirely false and groundless.

The defendant in his written statement stated that the allegation of the plaintiffs that the Mussamut filed the solehnamah at the instigation of and in collusion with him, the defendant, was devoid of truth and incredible.

It is clear that the daughter's could not be bound by a compromise made by the widow under any circumstances. Even if the compromise had been made by the widow voluntarily it was not against her interest, for she was to remain in possession of the whole property for her life in the same manner as if the adoption had not been made. If instead of coming to a compromise and making mutual concessions Roop Narain had continued to assert his claim as heir by virtue of an unconditional adoption, as he had done up to the time of the compromise, and the widow had continued to assert that no adoption whatever had been made, the widow might have been examined as a witness in support of her assertion. It should be remarked that the adoption set up in the suit, and attempted to be proved by some of the defendant's witnesses, is not an absolute adoption as originally set up by the defendant, but an adoption subject to a condition or arrangement to the same effect as that stated in the compromise. One of the grounds upon which the Subordinate Judge thought that the adoption set up by the defendant, in the

1880  
IMRIT  
KONWUR  
v.  
ROOP NARAIN  
SINGH.  
Judgment.

1880  
IMRIT  
KONWUR  
v.  
ROOP NARAIN  
SINGH.  
—  
Judgment.

compromise and in his written statement, was improbable, was that there was no writing, and certainly it appears to their Lordships to be very improbable that Perdip Narain should have adopted the defendant upon the condition that the widow should enjoy the property for life, and that his daughters should take his self-acquired property after her death without a single line in writing as evidence of the arrangement. Such a conditional adoption, without a writing to support it, would, like a nuncupative will, require very strong evidence to establish it.

In referring to the reason given by the Subordinate Judge with reference to the improbability of the adoption in consequence of the absence of any writing to support the condition or arrangement as to the possession of the property, the high Court were entirely silent.

In support of the allegation of the plaintiffs that both the widow and the defendant repudiated the compromise, it was proved that the widow, on the 13th June 1862, long after the date of the compromise, applied for a mutation of names, upon the ground that she was the widow and heiress of her deceased husband and in possession of the property.

Her application was not on the ground of a condition, and next to an adoption, according to which she was to enjoy the property for life, but upon the ground that she was the widow and heiress. In support of that application she filed a varasatnamah, dated the 30th May 1862, under the seal of the Kazi, upon which he declared, upon the deposition of two witnesses, that Perdip Narain left as his heirs only Mussamut Baneshur his widow, and two minor daughters, and that the widow was in possession of the property left by her husband. Thereupon a petition of objection was filed on behalf of the defendant, in which an absolute adoption was again set up without referring to any condition or arrangement by which the widow was to enjoy the property for life, and in that petition it was stated that the defendant had performed the funeral ceremonies, *Sradh pinddan*, &c.; that the widow had never had possession of the estate, and that she got her maintenance and necessaries from him; and that she should get them during her life. The petition went on as follows:—"The insertion of name depends upon possession, and

the Mussamut, aforesaid, is not in possession of a single beegah or cottah of the disputed lands. Therefore, according to the orders prevalent in Courts, the name of a person who is not in possession cannot be entered in the milkent and malgoozaree column, to which effect there are many orders of the Ziliah and Sudder. Secondly, the claim of the petitioner cannot, on any account, be entertained on the basis of this varasutnamah, inasmuch as at the time of the roobookar I will produce a great deal of evidence to prove the non-possession of the Mussamut, petitioner."

That allegation, which the defendant made in 1862, is utterly at variance with the petition of compromise which he had previously filed, and with the allegation in his written statement in the present suit, paragraph 4, in which he says:—"Mussamut Baneshur Konwur, in accordance with the expressed desire of the ancestor, held possession of the entire estate to the last day of her life."

Many witnesses were called on behalf of each of the parties to the suit. Some of those examined on the part of the defendant proved an unconditional adoption, corresponding with that set up by the defendant previously to the compromise; others an adoption subject to a condition or arrangement, corresponding with that stated in the compromise. Several witnesses on behalf of the plaintiffs, stated that no adoption was made. With respect to the plaintiff's witnesses the High Court said their evidence is purely negative, but it is to be remarked that if the evidence of Ram Narain Singh and of some of the other witnesses of the plaintiffs is to be believed, the adoption could not have taken place without their knowledge. There were other inconsistencies as regards the raising of money for the payment of the expenses of the marriages of the daughters, the performance of the *Sradh*, and other matters to which it is not necessary to refer minutely.

The Subordinate Judge alluded to the fact of the defendant not having offered himself as a witness, but the High Court made no remark upon that subject, confining themselves merely to criticising the reasons which the learned Subordinate Judge gave for disbelieving the individual witnesses of the defendant. Looking to the inconsistent statements made by the defendant from

1880  
IMMIT  
KONWUR  
v.  
RAM NARAIN  
SINGH.  
Judgment.



1880  
 IMBIT  
 KONWUR  
 v.  
 ROOP NARAIN  
 SINGH.  
 —  
 Judgment.

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In support of the allegation of the plaintiffs that both the widow and the defendant repudiated the compromise, it was proved that the widow, on the 18th June 1862, long after the date of the compromise, applied for a mutation of names, upon the ground that she was the widow and heiress of her deceased husband and in possession of the property.

Her application was not on the ground of a condition, and next to an adoption, according to which she was to enjoy the property for life, but upon the ground that she was the widow and heiress. In support of that application she filed a *varasut-namah*, dated the 30th May 1862, under the seal of the Kazi; upon which he declared, upon the deposition of two witnesses, that Perdip Narain left as his heirs only Mussamnt Baneshar his widow, and two minor daughters, and that the widow was in possession of the property left by her husband. Thereupon a petition of objection was filed on behalf of the defendant, in which an absolute adoption was again set up without referring to any condition or arrangement by which the widow was to enjoy the property for life, and in that petition it was stated that the defendant had performed the funeral ceremonies, *Sradh pindhan*, &c.; that the widow had never had possession of the estate, and that she got her maintenance and necessaries from him; and that she should get them during her life. The petition went on as follows:—"The insertion of name depends upon possession, and

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That allegation, which the defendant made in 1862, is utterly at variance with the petition of compromise which he had previously filed, and with the allegation in his written statement in the present suit, paragraph 4, in which he says :—" Mussamut Baseshur Konwur, in accordance with the expressed desire of the ancestor, held possession of the entire estate to the last day of her life."

Many witnesses were called on behalf of each of the parties to the suit. Some of those examined on the part of the defendant proved an unconditional adoption, corresponding with that set up by the defendant previously to the compromise; others an adoption subject to a condition or arrangement, corresponding with that stated in the compromise. Several witnesses on behalf of the plaintiffs, stated that no adoption was made. With respect to the plaintiff's witnesses the High Court said their evidence is purely negative, but it is to be remarked that if the evidence of Ram Narain Singh and of some of the other witnesses of the plaintiffs is to be believed, the adoption could not have taken place without their knowledge. There were other inconsistencies as regards the raising of money for the payment of the expenses of the marriages of the daughters, the performance of the *Sradh*, and other matters to which it is not necessary to refer minutely. The Subordinate Judge alluded to the fact of the defendant not having offered himself as a witness, but the High Court made no remark upon that subject, confining themselves merely to raising the reasons which the learned Subordinate Judge gave for believing the individual witnesses of the defendant. Looking to the inconsistent statements made by the defendant from

1880  
IMRIT  
KONWUR  
v.  
ROOP NARAIN  
SINGH.  
Judgment.

1840  
—  
1841  
KOSWEE  
v.  
ROSE SARAH  
SUGA.  
—  
*Judgment.*  
—

time to time, the conflicting evidence of the witnesses, the improbability of such a conditional adoption as that set up by the compromise, and also by the defendant in his written statement without any writing in support of it, their Lordships are of opinion that the defendant ought to have been called as a witness, and offered himself for cross-examination, and that in his absence the Subordinate Judge had good reasons for believing the evidence on the part of the plaintiffs instead of the witnesses examined on the part of the defendant.

The defendant himself was about eighteen years of age at the time when the alleged adoption took place, and must, therefore, have had recollection of the facts connected with the adoption if it had taken place.

Looking at all the circumstances their Lordships think that there were no sufficient grounds for reversing the judgment of the Subordinate Judge of Tirhoot, and consequently they will humbly advise Her Majesty to allow the appeal, and to reverse the decision of the High Court.

The respondent must pay the costs of this appeal.

## [CIVIL APPELLATE JURISDICTION.]

CHUTKA PANDA . . . . . APPELLANT ;  
 AND  
 GOBURDHONE DASS AND OTHERS . . . RESPONDENTS.

*Attachment—Execution of decree, Sale under attachment during subsistence of a prior attachment—Priority of attaching creditors—Civil Procedure Code, Act X of 1877, section 313.*

1880  
 Feb. 13th.  
 No. 188 of  
 1879.

In execution of a decree obtained on the 15th August 1876, the property of the judgment-debtor was attached on the 17th August 1877.

The sale of the attached property was postponed pending a suit, instituted under the direction of the Court, by a claimant to the attached property. This suit having been dismissed on the 13th September 1878, the decree-holder, on the 25th September, applied for a sale of the property, and the 16th December was fixed for the sale.

Meanwhile on the 13th December 1877, a decree had been obtained by another party against the judgment-debtor, and in execution of this decree the same property was attached on the 13th September 1878, and under this attachment a sale took place on the 15th November, following. On the 16th December, as fixed, the property was again sold under the first attachment.

The auction purchasers, at that sale, on the 6th January 1879, applied, under section 313 of the Civil Procedure Code, to set aside the sale on the ground that the judgment-debtor had no saleable interest. *Held* (reversing the decision of the lower Court) on the authority of the following cases—*Gogaram vs. Kartick Chunder Singh*, 9 W. R., 514; *Lalla Joogul Lall vs. Bhuka Chowdhry*, 9 W. R., 244; and *Kartick Chunder Singh vs. Gogaram*, 2 W. R. Misc., 48—which the Court felt bound to follow, while it doubted their correctness, that the sale must be set aside.

**A**PPEAL from a decision passed by the Officiating Judge of Gya.

In this case Chutka Panda, the appellant, and Kesho Narain Singh applied under section 313 of the Civil Procedure Code, to set aside the sale of certain property purchased by them for Rs. 2,310 on the 16th December 1878, in execution of a decree obtained by Goburdhone Dass against Juggu Lal, on the ground that the person whose property purported to be sold had no saleable interest therein as his rights and interests had been sold on the 15th November 1878, in execution of a decree obtained by Mohur Lal against Juggu Lal, purchased by Makuunda Bebee

1560  
 CHUTKA  
 PANDA  
 v.  
 GORAKHDHON  
 DASS.  
 —  
 Judgment.

for Rs. 1,020. Gobardhone Dass objected to the application on the ground that the attachment in execution of his decree was subsisting at the time that the attachment in execution of the other decree had been made, and that the purchasers, under the second decree, were only entitled to the rights and interests of the judgment-debtor as they existed at the time of the first attachment. The first sale had been confirmed on the 20th December 1878, four days after the second sale.

The facts relating to the attachments will be found in the judgment of the High Court.

The District Judge made the following order:—"The only way out of the difficulty appears to be to confirm the second sale in which the property fetched Rs. 2,310, and to set aside the first sale when the property was sold for Rs. 1,030, only on the understanding that out of the proceeds of the second sale the sum of Rs. 1,030 be paid to the Makunda Bebee, the first purchaser, the balance only being paid to the decree-holder."

This order was made without notice to Makunda Bebee.

She applied and obtained a rule to show cause why the order of the District Judge should not be set aside.

The rule was heard together with the appeal, which one Chutka Panda, one of the purchasers at the second sale, preferred against the order.

Baboo *Mohesh Chander Chowdry*, for the Appellant.

Mr. *M. L. Sandel*, for the Petitioner.

Moonshee *Mahomed Yuseof* appeared for the Respondents and showed cause against the rule.

The judgment of the Court (1), which was as follows, was delivered by

POSTIFEX, J. POSTIFEX, J. :—

Gobardhone Dass, the respondent before us, having obtained a decree (15th August 1876) against one Juggu Lall, the decree was sent to the Court at Gya for execution, and the property of Juggu Lall was attached on the 17th August 1877.

A third party having put in a claim, the sale of the attached property was postponed, pending the decision of a regular suit,

(1) POSTIFEX and McDONELL, J.J. •

which the third party was directed to institute. That suit was instituted and dismissed on the 13th September 1878.

On 25th September 1878 Goburdhone Dass applied for a sale under his attachment, and the 16th December 1878 was the day appointed for sale under it. Goburdhone Dass, therefore, appears to have acted with due diligence, and is not responsible for any delay in the proceedings under his attachment. But in the meantime, Munohur Lall, the brother of Juggu Lall, instituted a suit against Juggu and obtained a decree on the 13th December 1877. But it was not until the 13th September 1878, the very day the suit by the objecting party under the first attachment was dismissed, that Munohur Lall attached Juggu's property under his decree. A sale, under this last attachment, was directed to take place on the 15th November 1878. The sale under Munohur's attachment accordingly took place on the 15th November 1878, and the property was purchased by Mukunda Bebee, a near relative of Munohur and Juggu Lall, for Rs. 1,030.

We think the circumstances of this sale, having regard to the date of Munohur's attachment, the connection between the parties, and the price paid, are exceedingly suspicious.

Makunda Bebee, on the 30th November 1878, petitioned the Court to stay the sale proceedings under Goburdhone's attachment, but on the 16th December 1878, the day appointed for the sale under the first attachment, her application was rejected on the ground that the sale to her had not then been confirmed. The sale under Goburdhone's attachment accordingly proceeded, and the property was purchased at that sale by Kesho Narain Singh and Chutka Panda for Rs. 2,310.

On the 20th December 1878 the sale to Makunda Bebee was confirmed, and possession given under it. Subsequently on the 6th January 1879, Kesho Narain Singh and Chutka Panda applied under section 313 of the Civil Procedure Code to set aside the sale to them, on the ground that in consequence of the previous sale to Makunda Bebee the judgment-debtor had no saleable interest on the property.

On the 15th May 1879 the Judge of Gya, upon that application ruled that the only way out of the difficulty which had arisen was to confirm the second sale, and to set aside the first sale; but,

1880  
CHUTKA  
PANDA  
v.  
GOBURDHONE  
DASS.  
—  
*Judgment.*  
—  
PONTIFEX, J.

1880  
 CHUTKA  
 PANDA  
 v.  
 GOBURDHONE  
 DASS.  
 —  
*Judgment.*

PONTIFEX, J.

subject to the following provision, namely, that out of the Rs. 2,310 the purchase-money at the second sale, Rs. 1,030, should be paid to Makunda Bebee, the balance only Rs. 1,280 being paid to Goburdhone Dass under whose attachment the second sale was made, and he ordered accordingly.

In the first place, this order is clearly wrong; because it was made behind the back of Makunda Bebee, who has obtained a rule to shew cause why the order should not be set aside, which rule must be made absolute, and the Judge's order of the 15th May 1879 must be set aside against her.

In the next place, the order is wrong; because if the sale under Goburdhone's attachment is confirmed, the Judge had no authority to deal with the purchase-money in the way which he has directed.

Chutka Panda, one of the purchasers under the second attachment, has appealed to us to annul the sale of the 16th December 1878, under section 313 of the Code. Goburdhone, on the other hand, resists the application.

It devolves upon us, therefore, to deal with this appeal in the absence of Makunda Bebee, who has not been made, and who could not properly have been made, a party to the petition. If this case had been uncovered by authority, I, speaking for myself, should have had very little difficulty in arriving at a conclusion upon it, and holding that the second sale of 16th December 1878 was valid, and should be confirmed.

Whatever may be the exact nature of an attachment, I should have supposed, that it gave the first attaching creditor (at all events when he had shewn due diligence in proceeding with his attachment) a right to have the property sold under his attachment, and that if a sale *could* be held under a second or subsequent attachment, the purchaser, at such a sale, would take subject to the subsisting and overriding right of the first attaching creditor.

Whether a sale could or ought to be held under a subsequent attachment pending a prior attachment, seems to have been doubted by Sir BARNES PEACOCK, in the case of *Gogaram vs. Kartickchunder Singh*, 9 W. R., 514. He says:—"The property was first attached under a decree of the Moonsiff's Court at the suit of the plaintiff

and was subsequently attached and sold at the suit of the defendant, under a decree of the Judge's Court, and the proceeds were made over to the defendant. It seems to me that while the property was under attachment by the Moonsiff's Court, *it was not liable to be sold* under the decree of Judge's Court, although it might have been attached subject to the prior attachment of the plaintiff," and Sir RICHARD COUCH seems to have expressed a similar doubt in the case of *Guru*, 9 B. L. R. 185. But notwithstanding his expression of doubt, Sir BARNES PEACOCK, in the case quoted, decided that the first attaching creditor had a right to sue the second attaching creditor, under whose attachment the property had in fact been sold, for the purchase-money received by him at such sale; which decision seems to me to involve the following consequences, namely, that a sale can take place under a second attachment pending a prior attachment; and that such sale is not subject to a right in the first attaching creditor to proceed with his attachment proceedings and sell the property thereunder. For otherwise the sale by the second attaching creditor could have in no wise injured the first attaching creditor, who would, therefore, have had no right to sue for the purchase-money realized by the sale under the second attachment, and there are other rulings at p. 62 of 2 W. R., and p. 244 of 9 W. R. which have decided that priority of attachment does not give a decree-holder a right to set aside a sale made by another decree-holder on a subsequent attachment; and that his right, as provided by section 270, of Act VIII of 1859, is merely, to be paid first out of the proceeds of sale.

I agree with the doubt expressed by Sir BARNES PEACOCK, at p. 316 of 9 W. R., whether section 270 applies to the case at all. It seems to me to provide for quite a different matter, namely, it simply enacts that the date of the attachment, and not the date of the decree, shall give priority. If it affects the question at all it would appear to postpone all proceedings under the second attachment; and I confess further that if I had to form an independent opinion on the question, I should be inclined to depart from all the authorities quoted, for they do not seem to be deducible from, or obligatory under, Act VIII of 1859; they certainly do afford a dishonest debtor an opportunity of

1880  
CHUTKA  
PANDA.  
v.  
GOBURDHONN  
DASS.  
Judgment.  
PONTIFEX, J.



1888  
CHUTKA  
PANDA  
s.  
GOBURDHONE  
DASS.  
—  
Judgment.

defrauding an honest attaching creditor. In this very case we see that the prior sale under the subsequent attachment realized only Rs. 1,030, the circumstances being highly suspicious; whereas the subsequent sale under the prior attachment, which we are about to set aside, realized Rs. 2,310.

But we are bound by the authorities, and even if the question were only doubtful, the matter we have to decide is whether a doubtful sale ought to be confirmed. The appellant in fact stands very much in the same position as a purchaser against whom it is sought to enforce specific performance of a contract which is never granted where the title is doubtful.

We being bound by the authorities must, therefore, reverse the decision of the Court below, and set aside the sale of the 16th December 1878, and direct repayment to the appellant and his co-purchaser, Kesho Narain Singh, of the Rs. 2,310, or so much thereof as has been paid by them on their purchase.

We feel that our order will be a hardship upon Goburdhone Dass, but as the authorities stand, we are unable to prevent this; and we must leave him to take proper proceedings either for the purpose of setting aside the sale to Makundo Bebee if he can prove it was fraudulent or improper, or for the purpose of recovering the Rs. 1,030 which seems to have been a wholly inadequate price. We shall give no costs of the rule, for we may at least express an opinion of disapproval at Makunda Bebee's purchase, when she must have known that a sale under the first attachment was imminent. Nor can we give any costs to the appellant, who must or ought to have known of the first sale, and that he was purchasing the luxury of certain litigation. But we think that Goburdhone Dass, the first attaching creditor must have his costs of all the proceedings, in this Court and in the Court below, against his judgment-debtor, Juggu Lall.

## [CIVIL REVISIONAL JURISDICTION.]

SIMPSON . . . . . PLAINTIFF;  
 AND  
 CLEGHORN . . . . . DEFENDANT.

1880  
 Feby. 10th.  
 No. 1183 of  
 1879.

*Small Cause Court—Revision of decree of Small Cause Court.*

A suit having been brought in a Small Cause Court for damages laid at Rs. 400 for wrongful dismissal, a decree was given for Rs. 75 per mensem, the amount of wages which had been agreed on, up to the filing of the plaint, the Judge intimating that for damages accruing after the filing of the plaint further suits month by month might be brought. Two suits were accordingly brought for the two months next succeeding the date of the first suit, and decrees were obtained.

The High Court, upon an application made by the defendant, set aside these decrees on the ground that after the first suit no further suits could lie.

**R**ULE to show cause why the decrees in suits Nos. 1609 and 1733 of 1879, passed by the Judge of the Court of Small Causes at Kishengunge, should not be set aside.

The rules were obtained under the following circumstances:—

One Edward Smith sued the defendant Cleghorn in suit No. 1287, in the Court of Small Causes at Kishengunge, for damages laid at Rs. 400 for breach of contract, alleging that he had been engaged at a salary of Rs. 75 per mensem, as manager of an Indigo factory for the entire season of 1879, but that before the expiration of the season, he had been wrongfully dismissed by the defendant on the 6th April 1879.

On the 9th July 1879, the Judge decided that the full claim for damages could not be given in the suit, but gave a decree for Rs. 75 per mensem from the commencement of the period of service up to the filing of the plaint. He further directed that the plaintiff might sue month by month for further damages as they accrued due.

In accordance with this direction the plaintiff subsequently instituted two suits Nos. 1609 and 1733 of 1879, respectively in the same Court; the former for Rs. 53-3-6 damages for part July, and the other for Rs. 75 for August, and obtained decrees for the amounts claimed.

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 Judgment.

The defendant who had urged in both cases that the suits would not lie on the ground that the cause of action in each of them was the same as in suit No. 1287, and that the amounts in them had been included in that suit, thereupon, applied to the High Court for, and obtained a rule to show cause why decrees in the two later suits should not be set aside.

Mr. M. Sandel, for the Petitioner.

The judgment of the Court (1) was as follows :—

On hearing this matter, it appears to us that the Court of Small Causes has given a judgment which cannot be supported. It has in effect given the plaintiff one decree for his wages up to the time when the plaint was filed, and has declined to consider the question of damages further, on the ground that future damage was uncertain and the claim premature.

It has then permitted, if not encouraged, the plaintiff to bring successive suits for the wages of succeeding months, and has given him decrees on two such suits.

It is clear that on the facts alleged the plaintiff had one cause of action, viz., his wrongful dismissal, and one claim for the amount of damages thereby sustained, which damages ought to have been estimated in the suit at first brought, and the whole matter would have been closed. There could be obviously no other suits for the wages of other months, as no relation of master and servant subsisted, and as for damages there could be no further suit in the same cause of action.

The first decree and the decrees in the two subsequent suits are all before us. Accepting it as rightly found that the plaintiff was wrongfully dismissed, and seeing that he has obtained under the first judgment wages in full up to commencement of suit, and has not complained of that award, we think the ends of justice will be satisfied by our setting aside, as we hereby do, the subsequent decrees, and directing that those suits be respectively dismissed, but without costs.

The rule to this extent is made absolute, with costs against the plaintiff.

(1) JACKSON and TOTTERHAM, J.J. •

## [CIVIL APPELLATE JURISDICTION.]

AUKHIL CHUNDER CHOW- } (DEFENDANTS) APPELLANTS;  
 DHRÛ AND OTHERS . . . . . }  
 AND  
 MIRZA DELAWAR HOSSEIN } (PLAINTIFFS,) RESPONDENTS.  
 AND OTHERS . . . . . }

1880  
 Feb. 20th  
 No. 13 and  
 14 of  
 1877

*Limitation Act, IX of 1871, Schedule II, Art. 46—Act XV of 1877, Schedule II, Art. 47—Possession, orders for, under Criminal Procedure Code—Evidence in case of re-formation of chur lands.*

Certain chur lands, which had been submerged, having re-formed, were claimed by a number of parties. In a proceeding under section 318 of Act XXV of 1861, the Magistrate, in January 1871, directed possession to be given to certain persons known as the Roys. In 1872 the present appellants instituted a suit against the Roys to set aside the order of the Magistrate, and, on the 16th December 1873, obtained a decree in the High Court, under which possession was given on the 10th July 1874.

In 1874, more than three years after the Magistrate's order, the plaintiffs instituted two suits against the Roys, and the appellants, for possession of the lands made over to the latter under the decree of 1873.

*Held*, that these suits were not barred by Limitation under Art. 46, Schedule II of the Limitation Act, IX of 1871. Cf. Act XV of 1877, Schedule II, Art. 47.

That article can only apply between the parties whose possession has been confirmed by the Magistrate, and each one of the parties to that proceeding who claimed against them. It does not apply in favour of one of the parties who has subsequently succeeded by regular suit in ousting the parties put in possession by the Magistrate.

*Durgaram Roy vs. Rajah Nursing Deb*, 2 B. L. R., A. C., 254; and, *Chintamani vs. Iswar Chandra*, 3 B. L. R., Appx. 122, cited.

The evidence to be produced, and the onus of proof in cases of re-formed chur lands discussed.

APPEALS from decisions passed by the Subordinate Judge of Meerapore, dated the 21st August 1876.

Baboo Sreenath Dass and Munshi Serajul Islam, for the Appel-

Baboo Chunder Madhub Ghose, and Baboo Aukhil Chunder for the Respondents.

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 ATKINIL  
 CRUSDER  
 CROWDER

—  
 MIRZA  
 DELAWAR  
 HOSSEIN.

—  
 Judgment.

—  
 PONTIFEX, J.

The judgment of the High Court (1), which was as follows, delivered by

PONTIFEX, J. :—

This case is one of unusual difficulty, and it has been ably argued on both sides. After giving a careful consideration to the arguments and to the evidence we are unable to come to any other conclusion than that the decision in the case below was substantially correct. The suit, in which there is appeal and a cross-appeal before us, relates to a large formation of chur land in the river Pudma.

We think the evidence shows that the variations of the course of that river have been so frequent, and the formation of new land caused from time to time by such variations, have been of such short subsistence that it is virtually impossible for either party to prove that the land in question has been formed on the original site to which anything more than a holding title can be shown.

Upon its last re-formation it was claimed by six different parties including the appellants and respondents. In a proceeding under section 318 of Act XXV of 1861, the Magistrate, on 16th January 1871, directed possession to be given to certain persons, among those parties who have been called in the argument the "Roy Defendants."

By article 46 of schedule II to the Limitation Act of 1877 the period of three years is limited for disputing such order.

In the year 1872, the defendants, appellants, instituted a suit against the Roy defendants, to set aside the Magistrate's order and on the 16th December 1873, they obtained a decree in the High Court for that portion of the new formation which was enclosed within red lines on the Ameen's Map in this suit, and which alone the present suit relates; and on the 10th January 1874 the defendants, appellants, got possession of such portion.

More than three years after the Magistrate's order, the plaintiffs, respondents, instituted two suits against the Roy defendant

(1) PONTIFEX and McDONELL, J.J. °

one on the 23rd March 1874 with respect to 10 annas, and the other on the 11th January 1875, with respect to the remaining 6 annas. To neither of these suits did they, in the first instance, make the present appellants, defendants.

An Ameen having been deputed in those suits to examine the land in dispute in those suits, which covered more than what we have called the red portion reported that the appellants were in possession of such portion, whereupon the plaintiffs, respondents, on the 10th March 1875, presented a petition to include the appellants as defendants in their first or 10-anna suit; and on the 24th April 1875, presented a similar petition in their second or 6-anna suit. The appellants were accordingly made defendants with respect to the red portion.

The first objection which the appellants raised before us and before the lower Court was an objection of limitation under article 46 of the late Limitation Act.

That objection was overruled by the lower Court upon the ground apparently that the present plaintiffs were not properly parties to, or represented in, the proceedings before the Magistrate. But, however this may be, we think that the objection is not sustainable on a higher ground.

We think that article 46 can only apply between the parties whose possession was confirmed by the Magistrate and each one of the parties to that proceeding who was claiming possession against them, and that it does not apply in favor of one of those parties who subsequently succeeds by a regular suit in ousting them.

So far as the Magistrates' order is concerned, the present plaintiffs were only bound to respect the possession of the Roy defendants, or those claiming under them, unless they instituted a suit within three years. That possession having been got rid of, and the defendants having obtained possession adversely to the Roy defendants, we do not think that article 46 prevents the present plaintiffs from suing the present defendants in a regular suit for declaration of title. The case is similar in principle to the cases of *Durgaram Roy vs. Rajah Narsing Deb*, 2 B. L. A. C., 254, and *Chintamania vs. Iswar Chandra*, 3 B. L. R., 122. We accordingly overrule the appellant's objection on

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DELAHAR  
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Judgment.  
PONTIFEX, J.

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 Ameen  
 Chur Nasirpore  
 Narikelbaria  
 The appellants  
 The defendants  
 The Court below

the point of limitation; we therefore proceed\* to consider the case on its merits.

The plaintiffs claim the red portion partly as a re-formation on the site of four of the original villages, one of which was called Narikelbaria, and partly by accretion thereto.

The appellants, defendants, state their title to the land as a re-formation on the site of Chur Nasirpore with accretions thereto.

The Court below has given the plaintiffs two plots of land, namely one plot to the south, being the eastern portion of land enclosed in green lines and marked "B" on the Ameen's map in this suit, and one plot to the north, being the eastern portion of land enclosed in yellow lines and marked "C" on the same map.

The plaintiffs title to the two plots has been proved and must be dealt with separately, and first with respect to the plot in the south. The plaintiffs produced before the Ameen a map No. 19, alleged to be the Thak map of Narikelbaria made on the 11th November 1854.

It was by the help of this map that the Ameen defined this boundary plot as being part of the land held with Narikelbaria in 1854.

But the defendants, appellants, object (1) that the map is a false map; (2) that if it is a true map there is no proof that the land shown in it covered the original site of Narikelbaria; and (3) that it does not cover the land now in dispute. With respect to the first objection they urge that the map was prepared, as shown by a note on the left hand side of it, as a map of a re-formation on the site of their property, Chur Nasirpore, and that the note on the right hand lower corner of it denoting that the land mapped was determined to be included in Narikelbaria was made without authority. That in fact it cannot be properly called a thak map of Narikelbaria.

Now we find that in 1859 Chur Nasirpore belonged to Government, the defendant's vendor, and was then under lease to an Ujaradar, who, as before observed, caused the land to be measured as a re-formation of Chur Nasirpore.

Upon this a Mr. Francis Phillips, the lessee of the proprietors of Narikelbaria, applied to the Thakbast authorities, and Uma

Kinkor Chowdhry, the Thakbast Peshkar, was sent to the locality, which he examined in the presence of the agents of the Government Ijaradar and Mr. Phillips. He reported on the 24th April 1859 that the disputed Chur was not covered by the khas (Government) map, and that it was in the possession of Mr. Phillips. On the 7th May 1859 Ehsan Ahmed, the Thakbast Deputy Collector, ordered that a Hukumnama be issued to the Nazir, directing him to make both the parties attend with their documents and evidence at the disputed spot on the 12th May.

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HOSSEIN.

*Judgment.*

PONTIFEX, J.

This Ehsan Ahmed is the same officer, who according to the note on the right hand corner of the Thak map, by order, dated the 23rd of August 1859, directed the disputed spot to be included within Narikelbaria. Pending these proceedings, the Government Ijaradar appears to have applied to the Collector on the Revenue side. The nature of this application is not very clear. It appears to us to have been an application to the Collector as representing the Government, the then owner of Chur Nasirpore, by their tenant, apprising the Collector that what the Ijaradar alleged to be Government land was about to be improperly included by the Thakbast authorities in Narikelbaria. It certainly does not seem to have been a suit in the ordinary sense.

On the 29th July 1859, the Collector having heard the Government Ijaradar and Mr. Phillips, gives a statement and decision on the case in page 26 of Book 14, and he ordered that the Government Ijaradar's objections should be rejected; that the disputed land should be confirmed in the possession of Mr. Phillips agreeably to the map sent by the Thakbast Deputy Collector; and that a copy of his decision should be sent to the Thakbast Deputy Collector.

The Ijaradar, not content with this decision, carried the matter up to the Revenue Commissioner who, on the 24th December 1859, after stating that there had been a suit between the parties which had been tried by Moulvi Eshan Ahmed, the Thak-bast Deputy Collector, the result of which was not known, ordered (p. 16, Book 14) that a copy of his proceeding should be sent to the Survey Superintendent, requesting him to send information as to the result of the Thakbast case.



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PONTIFEX, J.

Nothing more appears to have been done by the Revenue authorities, and either the Ijaradar must have dropped his application, or the Revenue authorities must have had before them the order of Ehsan Ahmed, stated in the corner of the thak map, to have been dated the 23rd of August 1859.

We think that the result of those proceedings must be taken to be that both Government and their Ijaradar gave up all claim to the lands delineated on the thak map, and directed by the order of the 23rd August 1859 to be included in Narikelbaria. No doubt it would have been more satisfactory to have that order before us; but though it has not been put in evidence in this suit, we think that the other proceedings, which are in evidence, sufficiently show what actually happened in 1859. This is confirmed by the oral evidence of Asimuddi Kuri, one of the appellant's witnesses, who says, "the land for which the dispute arose with Mr. Phillips was thaked. It was thaked as appertaining to Nasirpore. Mr. Phillips brought a suit and took it."

The appellant's second objection is, that there is no proof that the land shown by the thak map covered the original site of Narikelbaria.

In this objection we agree. We think the proof in this respect is defective; but we have already said that the vagaries of the river have been so frequent and the re-formations have had such short existences, that it is practically impossible for either party to prove re-formation on an original site, held by more than a possessory title. But we think that the southern plot, given to the plaintiffs in this case, is a re-formation on the site thaked in the map of 1859, from which the Government and their Ijaradar (whose interests the appellants now represent,) withdrew claim in 1859; and that under the circumstances of the case, we must accept that as sufficient evidence of a re-formation on a site which in 1859, immediately before its last submergence, was in the possession of the plaintiffs. The defendants have themselves shown no title whatever to the plot; though if it had not been for the last submergence their position would have been different to what it now is; for they would have had to sue as plaintiffs for possession of the land.

The appellant's third objection is, that the thak map does not cover the land now in dispute.

In support of this objection, as I understand them, they produce a Ganges Survey Map (No 157), the survey having been made in the season 1858-59. This they say shows no chur then in existence at the spot in dispute; But we think map No 157 is most unsatisfactory. For reliance to be placed on the Ganges survey, the map should have been carried further to the east by production of the next eastern sheet. So far as appears the chur might have been shown in such eastern sheet.

Appellant's further say that the plaintiffs ought to have put the survey map of Narikelbaria in evidence, and that an inference unfavorable to them should be drawn from their failure to do so.

No doubt that map ought to have been put in evidence; but we observe that, although the defendants (p. 33, book 14) were called upon to put in evidence the thak and survey maps of chur Nasirpore, they neglected to do so. It is true that they are defendants and in possession; but in a case like the present we think they were almost, if not quite, as much bound as the plaintiffs, to prove on what lands the re-formation had taken place. As we have before said, had it not been that the lands became submerged immediately after the proceedings of 1859, the positions of the parties would have been reversed. The defendants must have been plaintiffs in any suit to recover the lands, and the present plaintiffs would have been defendants. We think the thak map is a correct map of land possessed by the owners of Narikelbaria in 1859, and we are satisfied that the Ameen has traced and measured correctly on his map the land so thaked which includes this southern plot, and, although the case is not a very satisfactory one, we think the lower Court was right in giving this southern plot to the plaintiffs.

With respect to the northern plot, we think it sufficiently appears from the field book of the Ameen that he was able to take bearings by sighting a tree on the northern bank of the river from its southern bank, and that his measurements from the northern bank have been made with sufficient correctness. It is true that he himself says that there was a contention before

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him (p. 31, Book 14) that there was no certainty as to whether or not the point on the site of the Kuti, from which the measurement was made by him, was exactly the point from which the thak measurement had been made. But he also says the objection was not raised by the defendants, and that the site of the kuti being, as the fact was, admitted, the position of the exact point would make no appreciable difference in the result. We PONTIFEX, J. therefore agree with the lower Court in also giving this northern plot to the plaintiffs.

The plaintiffs have, by way of cross-appeal before us, claimed (1) that all the rest of the land sued for should be given them; and (2) that the decree of the Court below, dismissing their suit altogether as to a one anna 10 gundas share, should be reversed.

With respect to their first claim, they allege, but do not prove, that the land held by the defendants under the decree of the Court below has reformed on original sites belonging to them. They put their case in this way,—that their four villages, including Narikelbaria, lay all together, and therefore they say if the northern and southern plots are given them as parts of Narikelbaria, the intermediate portions must also belong to them. But the answer to this is that the southern plot is given to them not as proved to have reformed on the original site of Narikelbaria, but on a site relinquished by Government and its Ijaradar in their favor in 1859. We are unable to give them any further advantage upon the evidence in the case than the southern plot, as reformed on a site in respect of which the proceedings of 1859 resulted in their favor, and the northern plot, as reformed upon part of the original site of Narikelbaria, according to measurement and survey.

They do indeed also claim this intermediate portion by way of accretion to the southern plot. It did not appear to us that the claim was more than faintly urged. We are satisfied that the evidence is not sufficient to establish it, and we therefore reject the cross-appeal with respect to the intermediate lands. We are also clearly of opinion that the Court below was right in dismissing the suit with respect to the one anna 10 gundas share of which Futteh Ali is tenant for life. The plaintiffs are simply remainder men with respect to that share, and they are not

entitled to sue, and limitation cannot run against them until their estate falls into possession (Art. 141, Schedule 2, Act IX of 1871).

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Upon the whole, therefore, we think the Court below has come to a correct conclusion. At all events we are unable to say that a case has been made for interfering with its decision. We must therefore dismiss the appeal and cross-appeal. Each party will bear their own costs in this Court.

[PRIVY COUNCIL]

DINOMOYI DEBI CHOWDHRANI . . . . APPELLANT;

1879  
December 3rd,

AND

LUCHMIPUT SINGH BAHADUR . . . . RESPONDENT.

*Agent, Termination of authority of—Notice—Acknowledgment—Limitation—Secondary Evidence.*

H., who had acted as agent for the defendant in certain money transactions with the plaintiff having left the defendant's service, subsequently signed a statement of account with the plaintiff in respect of such transactions. The plaintiff was aware that H. had quitted the defendant's service, though no formal notice was given of the fact.

In a suit by the plaintiff upon the account, it was held, reversing the decision of the High Court, that he must be taken to have known that H. had no general authority to sign the statement of account on behalf of the defendant and that the acknowledgment signed by him could not prevent the operation of the Statute of Limitations.

When an important document is not produced, and no explanation is given of its non-production, an inference not unnaturally arises either that the letter if written does not contain that which it is represented to contain, or that no such letter ever existed.

APPEAL from a decision passed by a Divisional Bench (KEMP and AINSLIE, J.J.) of the High Court at Calcutta, on the 15th February 1877.

*Cowie, Q.C., and Doyne, for the Appellant.*

*Leith, Q.C., and G. W. Arathoon, for the Respondent.*

The facts are set forth in the following judgment of their Lordships of the Judicial Committee (1) of the Privy Council:—

This suit was brought by Roy Luchmiput Singh Bahadoor,

(1) Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir ROBERT P. COLLIER.

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who is a banker carrying on his business at Rudgpur, and having a branch bank at Baloochur in Moorsshedabad, against a lady of the name of Dinomoyi Debi Chowdhurani, to recover a large sum of money which is claimed as being due upon the balance of a banking account. This balance represents principal due up to the 29th Assin 1276, Rs. 12,402, and interest from that date to the 22nd Assin 1280, Rs. 5,548, making altogether Rs. 17,950. The plaintiff joined, as defendant in the action, Ramtarun Hazra, who was in the service of the first defendant, and whose position will be hereafter referred to, and also, as a third defendant Radha Churn Banerjee, her son-in-law and her Dewan. There seems to have been no ground whatever for joining these two persons, for they acted as agents only in the transactions which formed the subject of the action, and were in no way personally liable to the plaintiff. They may be considered as being out of the suit. The defence made to this claim was: first, a denial that the balance claimed was due; and secondly, that if that balance was at any time due, the right to recover it was barred by the Statute of Limitations, Act IX of 1871. It seems that Ram Tarun Hazra was what is called a Jammanuvia, a kind of accountant in the defendant's service; but undoubtedly he had mooktearnamas or am-mooktearnamas from the defendant; for the lady herself, who was examined on the part of the plaintiff, admits that they were given to him. However, they have not been produced. It is unquestionable also that Radha Churn acted as dewan of the lady. It seems that she had, on one or two occasions, deposited considerable sums with the plaintiff on deposit, and had also left with him on deposit valuable property in gold and silver; but on the other side moneys were drawn out from time to time on her account. A large sum of money, Rs. 17,000, was drawn from the bank to pay for an estate which she purchased. The items of the banking account were disputed in the Court below, particularly with regard to that sum of Rs. 17,000, and another sum of Rs. 16,000 which, though it was admitted to have been taken out for the purchase of this estate, was said to have been again paid into the bank. The banking account was managed, and the sums drawn out by Ram Tarun Hazra, who seems to have been the principal actor

in the transactions with the bank, though Radha Churn intervened in them, and must have known what was the state of the account from time to time. It seems that the account began in 1272, and was finally closed, so far as regards the drawing out and paying in of money, in 1274.

Four accounts altogether have been referred to, which bear the signature of Ram Tarun Hazra. The period of adjusting these accounts appears to have been in the month of Assin, created as the beginning of the commercial year. The accounts were kept both in Hindi and Bengali books. The dates spoken of in this judgment are those in the Bengali books. The last account (the third) which was adjusted, before we come to the adjustment and hatchitta, which are in question in this suit, was adjusted on the 10th Assin 1275, which corresponds with the 25th September 1868. No other account was adjusted until that in question, and upon the adjustment of which the hatchitta in dispute was said to be given on 24th Assar 1277, corresponding with 7th July 1870. Therefore this account, instead of being adjusted as in ordinary course it would have been in Assin of 1275, was not adjusted until the 24th of Assar 1277; and it was adjusted, not at Mohigunge, where the former accounts had been settled, but at Baloochur in Moorshedabad. It is said that the reason of the delay and of the settlement having taken place at Moorshedabad, was that there had been some altercation about the amount of interest which should be charged upon the balance due. The two Judges of the High Court, Mr. Justice KEMP and Mr. Justice AINSLIE, differed in the view they took of the truth of this mode of accounting for the delay. Mr. Justice KEMP gave credit to the statement of the plaintiff's witnesses who said that the cause of the delay was the dispute about the interest. Mr. Justice AINSLIE thought that the plaintiff's story with regard to it was a mere pretence. It is unnecessary, in their Lordship's view, to determine which of the learned Judges was right in his view of the evidence on that point. It is enough to say that this settlement was made out of the ordinary course, was made nine or ten months after the usual time for adjusting the account, and at an unusual place.

With regard to the first question, whether the balance which

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appears upon the accounts was at any time due from the defendant to the plaintiff, their Lordships, during the course of the argument, intimated that they did not find sufficient grounds for disagreeing with the judgment of the High Court upon that point. They desire to give no further expression of their opinion than to observe that the learned Judges had materials and evidence before them which they might fairly and properly consider, and their Lordships are not prepared to disagree with their judgment. The question remains whether the debt is not barred by limitation. The last settlement of account, which was regularly made and adjusted by Hazra, took place on 10th Assin 1275, nearly five years before the suit. In order therefore, to take the case out of the operation of Act IX of 1871 it is necessary for the plaintiff to establish that there has been an acknowledgment either by the defendant herself or by an agent of hers within the period of three years, which is the period of limitation applicable to the present claim. The 20th section of Act IX enacts:—"No promise or acknowledgment in respect of a debt or legacy shall take the case out of the operation of this act unless such promise or acknowledgment is contained in some writing signed before the expiration of the prescribed period by the party to be charged therewith, or by his agent generally or especially authorized in this behalf." The case of the plaintiff is, that an acknowledgment was signed by Hazra, and that he, at the time he signed it, was the defendant's agent, either generally or especially authorized in that behalf. The case is put in two ways: first, that his general authority to act for the lady continued up to the time when he signed the documents to be presently referred to; and secondly, it is said that there is evidence of a special authority given to him by her to make these acknowledgments.

The account relied on is alleged to have been adjusted by Hazra on the 24th Assar 1277 (the 7th July 1870). This account was entered in the plaintiff's khatta for the year 1275. It is extremely simple. It states the previous balance up to 10th of Assin 1275, Rs. 11,108, and the only new item is this:—"On account of chati game, Rs. 2. Then interest is added from the 11th Assin 1275 to the 29th Assin 1276, making a total of

Rs. 12,402-8 annas, which is the sum mentioned in the plaint. On the same day the memorandum, called the hatchitta, stating the account in a similar manner, was signed by Hazra. It contains the addition: "Interest will be paid at Rs. 1 per cent. per mensem."

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The extent of Hazra's authority is not shown by any document. The defendant, who was called as a witness for the plaintiff, stated that she gave am-mooktearnamas to Hazra; but they have not been produced, nor is there any evidence of their contents. It was the duty of the plaintiff, if he relied upon those am-mooktearnamas, to produce them. It appears that one at least was registered, and the plaintiff might have produced a copy. No effort was made to obtain the original. Hazra might have been served with a subpoena to produce it; and their Lordships, on the evidence before them, see no reason to suppose that Hazra was otherwise than favorable to the plaintiff. If he really had authority, and if he had given these documents acting within that authority, it was his interest to establish those facts; and from his being found in communication with the plaintiff, and also from the plaintiff having produced documents which he could only have obtained from Hazra, there is reason to suppose that he was, to say the least, well disposed to the plaintiff and to the present claim. Though the written authority has not been produced, their Lordships think enough appears upon the evidence to show that he had authority, at one time, to borrow money; indeed his acts in that respect were ratified by the lady herself.

Then comes the question whether the authority, which he may once have had, was continued down to the time (the 7th July 1870) when the acknowledgments in question were signed. In the absence of the am-mooktearnamas the answer to that question must depend on other evidence.

It is proved that in Bhadro 1276, Hazra left Rungpur and the residence of the defendant, and went to his own home in Moorshedabad, and he never returned to Rungpur. That was ten or eleven months before the signature of these acknowledgments. The fact that he left the defendant's service and did not return is proved conclusively by a great number of witnesses. The defen-



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 —  
*Judgment.*  
 —

dant herself gives this account of it:—"Hazra having taken a month's leave, went home and never returned, and he performed no business on my behalf. After that the said Hazra was no longer my servant." Another witness, Shoshodhur Chaki, says:—"In the month of Srabun or Bhadro 1276, Ram Tarun Hazra went to his house at Rampara in Moorshedabad. He has not come back since then. He did not get his salary after he had gone away, nor did he perform any business." The same facts are stated by ten or twelve witnesses called on the part of the plaintiff. Their evidence is nowhere denied or questioned, and is supported, if support were necessary, by the witnesses called on behalf of the defendant. Whether when he first went away he was discharged or not is immaterial. In the absence of evidence to the contrary, it is certainly to be inferred from the facts stated that his service had come to an end. If so, it is clear that he could have no general authority to sign these acknowledgments on behalf of the defendant.

Then it is said that the plaintiff had no notice that Hazra's authority had been put an end to; and, therefore, that as far as he is concerned, it must be deemed to have continued. Formal notice in cases of this sort is not required. It will be enough if the plaintiff knew of the agent's authority having ceased. That would depend upon his knowing whether Hazra had quitted the defendant's service, and that his authority was in that way revoked. Their Lordships find that Raout Mull, who was the plaintiff's gomashtha, and apparently one of the managers of the Kooti at Mahigunge, was aware of the fact, and it is nowhere denied that the circumstances under which Hazra had left, and continued to be absent, were known. Hazra had gone to his own country in Moorshedabad. Raout Mull says that he knew he had gone there, and Hazra is afterwards found to be communicating with the plaintiff upon this suit. The inference to be drawn from all the facts of the case is, that the plaintiff or his manager must have been aware of the situation in which Hazra was, and that his connection with the defendant had come to an end. If that be so, the plaintiff's case fails, so far as it depends on Hazra's general authority from the defendant to make the acknowledgments at the time at which he made them.

It is then contended that the defendant gave a special authority to Hazra to make the very adjustment which constitutes the acknowledgment in question. If that had been made out, nothing of course could have been plainer than this case would have become. What is relied on to establish the special authority is a letter alleged to have been written by the defendant herself. The evidence of it is to be found in the deposition of Raout Mull, and his statement is this:—"Afterwards in the year 1276 the Hazra went to his country in Zilla Moorsshedabad. Dinomoyi wrote a letter saying, 'you have calculated interest at too high a rate; for this reason the account cannot be adjusted here.' The Hazra is in Moorsshedabad; he will go to the plaintiff, and when the plaintiff reduces the rate of interest the account will be adjusted." An inquiry in the course of the examination of this witness was made by the defendant's counsel as to where letters were kept, and he says this:—"The letters that used to come when I was present, I used to make over to the sheristadar of the kooti. They used to remain in the kooti with the gomashtha. The letters that used to come to the gomashtha remained with him." And then again he says:—"The said letter was written after the karbar was closed. I do not remember the year. Dinomoyi wrote at the commencement of the Nagri year 1276, or Bengali year 1277, about the adjustment of the accounts in Moorsshedabad. I do not remember whether the said letter was to the address of the plaintiff, or of me, or of the gomashtha. I do not remember whether it contained the seal and signature of Dinomoyi or the signature of Radha Churn in bakalum. I received the said letter through the burkundaz of the plaintiff's kooti. The said letter used to remain in the plaintiff's sherishta. I cannot say where it is now." This witness could not say where it was at the time he was speaking, for he was no longer in the service of the plaintiff, having left it for some time. This important letter, which would be evidence of specific authority having been given by the lady to Hazra to adjust the accounts, was not produced, and no attempt was made to account for its non-production. The learned Judges of the High Court do not seem to have recognized the weight of the objections which arise from the non-production of this letter, and the

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 DINOMOYI  
 DEBI  
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 BAHADUR.  
*Judgment.*

want of any proper explanation to account for its absence. All Mr. Justice KEMP says of it is this : " It is to be regretted that the plaintiff has not been able to file the letter from the lady, the defendant No. 1, to this firm." The learned Judge assumes in that sentence that he was not able to file it, but there is no evidence that he was unable to do so. If such a letter existed it should have been in his sherishta. If any accident had occurred to prevent its production, it might have been shown.

Their Lordships, therefore, cannot agree with the Judges of the High Court in thinking that a special authority to Hazra to make the acknowledgments in question was sufficiently proved. It is a cardinal rule of evidence, not one of technicality, but of substance, that where written documents exist they shall be produced as being the best evidence of their own contents. Nothing is more dangerous than to allow parol evidence to be given of what they are alleged to contain when there is reason to suppose that the documents themselves exist. If a letter exist, it may contain something very different from that which the witness represents to be its contents. When an important letter is not produced, and no explanation is given for its non-production, an inference not unnaturally arises, either that the letter, if written, does not contain that which it is represented to contain, and therefore that it would not suit the purpose of the party to produce it, or that no such letter ever existed.

Their Lordships, therefore, think that the parol contents of this letter were not properly received in evidence ; and they further think, independently of the technical point of its admissibility, that the evidence does not afford trustworthy proof of the contents of the supposed letter. It is to be observed that there is no evidence that the adjustment, said to have been made in pursuance of it, was ever communicated to the defendant.

On these grounds their Lordships are of opinion that Hazra's authority, whatever it may have been, did not continue to the time when these acknowledgments were signed, and that the plaintiff has failed to prove any special authority from the lady to Hazra to make them.

Their Lordships must humbly advise Her Majesty to reverse the judgment of the High Court, and to affirm the judgment of

the Subordinate Judge, and to direct that the plaintiff do pay the costs of the litigation in India. He must also pay the costs of this appeal.

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## [ORIGINAL CIVIL JURISDICTION.]

G. M. STRUTHERS. . . . . PLAINTIFF;

April 14th.

AND

No. 509 of  
1878.

C. E. WHEELER AND ANOTHER . . . . . DEFENDANTS.

*Commission, Evidence taken on—Documents attached to return of—Civil Procedure Code (Act X of 1877), sections 141, 389 and 390—Practice.*

Documents attached to the return of a commission, and identified with the documents referred to in the evidence, may be read at the hearing of the suit in which the commission issued, unless they have been objected to on being tendered in evidence before the Commissioner.

Objections to the admissibility of such documents cannot be taken at the hearing of the suit.

**I**N this case the plaintiff sued to recover Rs. 1,535, damages for non-delivery of certain rapeseed.

The defendant, Mr. Wheeler, did not appear to contest the case. His evidence, however, had been taken by a commission, executed at Cawnpore. He did not deny the contract nor the breach, but he insisted that the other defendant Tulseeram was his partner.

*Jackson* (with him *Hill*) on behalf of the defendant Tulseeram objected to certain documents annexed to the commission being referred to, on the ground that it was impossible to identify them with the documents referred to in the evidence, and that they were not properly admissible in evidence and ought not to have been annexed to the Commission.

*Phillips* (with him *T. A. Apcar*) contended that the proper time for objections being made to documents used on the commission was at the time of the commission.

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 STEUTHERS  
 v.  
 WHEELER.  
 Judgment.

The judgment of Mr. Justice BROUGHTON, so far as it dealt with the point raised, was as follows :—

This is a suit in which the plaintiff claims Rs. 1,585, damages for non-delivery of rapeseed. The contract, dated the 2nd March 1878, was for 100 tons rapeseed at Rs. 4-1 per maund, delivery at Howrah within the 25th May 1878.

The defendant, Mr. Wheeler, does not appear to contest the case, but he has given his evidence on commission, and does not deny the contract or the breach. He says, however, that the other defendant, Tulseeram, was his partner. Tulseeram appears and denies the partnership in the contract. The issues are :—

*1stly.*—Whether Tulseeram was a partner with Mr. Wheeler?

*2ndly.*—What was the amount of the damages?

Almost all the evidence in this case has been taken on commission at Cawnpore. The commission has not been properly executed. A great many documents have been referred to in the evidence, but it is impossible to identify them with the documents attached to the commission. The plaintiff has, however, gone to trial on the materials that he has, and the case must be decided upon them.

Mr. Jackson at the outset took objection on the part of Tulseeram to the evidence, and the documents returned by the commissioners, and I thought it right first of all to come to a finding as to how far the commission and the documents attached to it could be treated as evidence here. It was a question which, from the nature of the case, must frequently arise. Mr. Jackson contended that he has a right to take objections now. He says, and not without reason, that commissions are executed often in a most unsatisfactory manner, and he also says, it is impossible to get pleaders in the mofussil who are sufficiently acquainted with the Law of Evidence to take proper objections as to its admissibility.

Mr. Phillips, on the other hand, contends with equal reason that had objection been made at the time the evidence was tendered, the person who tendered it might have placed before the commissioner sufficient materials to get rid of the objection.

With regard to the first of Mr. Jackson's objections, it seems to me that it is not for the Courts to remedy this inconvenience by straining the law, if it really seems to be the expressed intention of the Legislature that the evidence taken on commission should be read at the trial. With regard to the second objection, the remedy is in the hand of the person objecting, if he cannot get a proper pleader in the mofussil he must send somebody from Calcutta. The law, as it is enacted in the Code of Civil Procedure, appears to me to show that the evidence must, under the circumstances of this case, be read. Section 389 enacts as follows :—

\* \* \* "The commission and the return thereto, and the evidence taken under it, shall (subject to the provisions of the next following sections) form part of the record of the suit."

Section 141 which Mr. Phillips has referred to, provides that no document shall be placed on the record unless it has been proved or recorded in accordance with the Law of Evidence for the time being in force.

Section 390 enacts as follows :—"Evidence taken under a commission shall not be read as evidence in the suit, without the consent of the party against whom the same is offered, unless (a) the person who gave the evidence is beyond the jurisdiction of the Court, &c."

From this it is to be inferred that if the witnesses are out of the jurisdiction, the evidence may be read.

The witnesses in this case are out of the jurisdiction. It must, I think, be presumed that the commission is directed to persons competent to decide questions of evidence which may arise in the examination, or if the objections have been taken or improperly dealt with by the commissioners, the Court, which afterwards reads the commission, can decide how far the evidence ought to be used. Unfortunately in this case the commissioner has not attached the original documents proved in the evidence to the commission, and nothing has been pointed out to me to indicate that the parties agreed, as they very well might have done, to substitute copies, the originals being filed in another suit.

Marks of reference to indicate documents are almost entirely wanting, and the commissioner seems to have overlooked entirely

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Judgment.

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the rules which ought to guide him, and which are laid down in sections 141-142 of the Code. I think the proper course is to read the commission, and the evidence taken on such commission, and such documents as appear to have been identified. The case of *Dwarka Nauth Dutt vs. Gunga Dayi*, 8 Beng. L. R., 102, Appendix, seems to support this view, and I understand that this case has been followed in practice.

[CIVIL APPELLATE JURISDICTION.]

February 24th. ASKERY KHAN . . . . . (PLAINTIFF) APPELLANT ;

No. 286 of  
1877.

AND

ASHRUFUNNISSA . . . . . (DEFENDANT) RESPONDENT.

*Limitation Act, IX of 1871 Sched. II, Art. 87—Mutual account—Reciprocal demands.*

In 1869 defendants paid Rs. 1,200 into the plaintiff's bank, and at the end of the year there was a balance still due to him. On the 31st January 1870 that balance had been withdrawn, and there was then a sum due upon the account from the defendant to the plaintiff.

From that time up to September 1873, except on a few particular dates, the account continued to be against the defendant. The last date upon which there was a balance due to the plaintiff was the 2nd of July 1872, although subsequent payments, the last of which was on the 12th June 1873, had been made in reduction of that balance.

In December 1876, the plaintiff sued to recover the amount due upon the account.

*Held*, that even supposing the accounts between the parties to be mutual accounts, and that they were open and current until they were stopped, they could only be mutual down to the 12th June 1873, and that as it could not be said there were reciprocal demands after the 2nd July 1872, or at latest after the payment in June 1873, the suit was barred by Art. 87 of the Limitation Act, IX of 1871, Schedule II.

**A**PPEAL from a decision passed by the Subordinate Judge of Tirhoot.

*Moonshe Mahomed Yusoof*, for the Appellant.

*Baboo Chunder Madhub Ghose*, for the Respondent.

The facts sufficiently appear from the following judgment of the Court (1), which was delivered by

PONTIFEX, J. :—

The subject-matter of this suit is an account between a Banker and his customer. The Banker is the plaintiff in the suit, and the defendant, the customer, has pleaded limitation in answer to the suit; but the plaintiff has met that plea by insisting that his case comes under article 87 of the second schedule of the Limitation Act of 1871. In this Court he has taken a further objection that if it does not come under article 87, it comes under article 62 as a stated account.

The first transaction between the parties began on the 20th December 1869, when a sum of Rs. 1,200 was paid into the plaintiff's bank by the defendant's manager and on the 31st December 1869, there was a balance of Rs. 787 due by the bank to the defendant, but by the 31st January 1870, that balance had been overdrawn, and there was then due Rs. 857-6-2 from the customer to the bank. From that time until September 1873, the balance continued against the customer, except on the 2nd July 1870, the first December 1870, the 6th March 1871, the 4th February 1872, from the 21st March 1872 until the 10th April 1872, and from the 21st June 1872 to the 2nd July 1872.

The 2nd July 1872 was the last occasion that any balance was due from the bank to the defendant. After that the balance was all along against the defendant, and any sum which the defendant thereafter paid, only went in part payment of defendant's debt to the bank.

The last payment that was made was on the 12th June 1873, when a sum of Rs. 1,083-8 was paid, leaving still a large balance against the defendant.

This being the state of the accounts, in order to bring the case within article 87 of Act IX of 1871, and to prevent limitation running, plaintiff would have to show that here was a mutual, open and current account between the parties in which there were reciprocal demands. Now I must say that I should have considerable hesitation in holding that there was ever between

(1) PONTIFEX and McDONELL, J.J.

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Judgment.

PONTIFEX, J.



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 —  
*Judgment.*  
 —  
 PONTIFEX, J.

these parties a mutual account, although in the instances which I have mentioned, the defendant had in fact paid monies into plaintiff's bank which were in excess of his liabilities; for I do not think that the defendant could at any time have said, "I have an account against you, the banker." During nearly the whole of that time the banker could have said, "I have an account against you, the defendant." But unless they could each have said to the other "I have an account against you," I do not see how these could be "mutual" accounts. But even supposing that the accounts between these two parties could be called mutual accounts, and that they were open and current until they were stopped, still it appears to us that they could only be "mutual" down to the 12th June 1873, when the last payment of Rs. 1,083-8 was made by the defendant into the plaintiff's bank. After that time the defendant made no payments whatever, and from that time the account was only one way. But besides the account being mutual, open and current, there must, to bring it within clause 87, have been reciprocal demands between the parties.

Now, no doubt, when at the commencement of these accounts the defendant paid money into the bank, and when at the other times that I have mentioned there was a balance due to him from the bank, it might be said that he had a demand against the bank, and that, therefore, there were reciprocal demands between the parties down to July 1872, which was the last occasion that there was a balance in favor of the defendant; but from that date it appears to us that it cannot be said that there were reciprocal demands between the parties.

Then under article 87, the time within which the plaintiff must sue is "the time of the last item admitted or proved in the account." According to my reading of the article the word "item" means the last admitted item on the defendant's side of the account, or in other words the last reciprocal item. But in this case that item would be that of the 2nd July 1872, or at latest the payment in June 1873.

From that time no payments whatever were made by the defendant. In the accounts furnished by the plaintiff it appears that down to September 1873, the plaintiff did make payments on the defendant's behalf—payments which the plaintiff was

authorized to make, but after September 1873, it appears to us plaintiff made no payment that was authorized by the defendant.

It is true that for the purpose of saving limitation, having instituted the suit in December 1876, the plaintiff has included in his accounts certain payments in October, November and December 1873, and in January 1874, viz., Rs. 10 for Dr. Sandeford's fee in each of those months; but of course he is not entitled to rely upon these payments in order to take his case out of the limitation statute unless he was authorized by the defendant to make them.

We are satisfied upon the evidence, so far as it was read to us, that the defendant was in no way bound to pay for medical attendance on Mr. Wilson and Mr. McGregor. Mr. Wilson in his examination states: "I sanctioned Mr. McGregor's paying the doctor's fees out of the factory account estimate, intending to refund the same myself if objected to by the defendant." The payments made to the doctor being, so far as the defendant was concerned, wholly gratuitous and unauthorized, we think the plaintiff is not entitled to rely upon them. So that even if the case does fall under article 87, yet the last item on either side of the accounts would be in September 1873, and that being so, the suit would be too late and must fail on the ground of limitation.

But then it is said that the plaintiff can rely upon article 62, inasmuch as he furnished accounts, every month down to January 1874, and that each of these accounts, so furnished, must be taken as a stated account, and he claims under article 62 to sue from the time that the accounts were stated, i.e., from the time that he delivered his last account in January 1874. But we think it clear that even if the account delivered in September 1873, could on that date be treated as a stated account, the plaintiff could not, by adding small and unauthorized items in October, November and December 1873, and re-delivering his account, renew the statement of account up to January 1874, so as to give him the benefit of article 62.

We think that his case fails on this ground also, and that his was properly dismissed on the score of limitation.

There is a cross-appeal with respect to certain sums allowed

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ASKERY  
KHAN  
v.  
ASHRUFUN-  
NISSA.  
---  
Judgment.  
PONTIFEX, J.

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 ASKERY  
 KHAN  
 v.  
 ASHRAFUN-  
 NISSA.  
 Judgment  
 PONTIFEX, J.

by the lower Court, viz., the doctor's fees, which the plaintiff stated had been paid, and also interest which the lower Court seems to have allowed, although it refused to give a decree for the principal, as we have already observed. Plaintiff had no authority to make these payments to the doctor, and therefore, he is not entitled to recover them; and with respect to the interest that has been awarded, we do not see on what principle a decree can be given for interest, when by the judgment of this Court no principal is due. We think, therefore, that the defendant is entitled to a decree on his cross-appeal.

We should have had more reluctance in dismissing plaintiff's suit on the score of limitation, but for certain circumstances in this case. We find that the whole of these transactions between the plaintiff and the defendant occurred during the time that Mr. Wilson was the manager for the defendant; now the plaintiff must have known very well that Mr. Wilson was discharged in January 1874, and that there were disputes going on between him and the defendant; yet notwithstanding this the plaintiff according to his own case waits to the very last minute before he institutes his suit, though his claim might have materially affected the disputes between the defendant and Mr. Wilson. The plaintiff has himself to blame if now he is not entitled to a decree.

We cannot dismiss this case without remarking that the "paper book" has been prepared without due regard to the interests of the parties. The vakeels might have agreed to print in the space of half a sheet, such items of the accounts as were necessary for the decision of the case instead of which there have been no less than 70 or 80 pages of unnecessary accounts printed.

We dismiss plaintiff's appeal with costs, and we allow the cross-appeal, but without costs.

The result is that plaintiff's suit is dismissed.

## [CIVIL APPELLATE JURISDICTION.]

SHAMA SUNDURI DABI . . . . . APPELLANT ;

1880  
March 1st.

AND

NOBIN CHUNDER KOLYA AND ANOTHER . RESPONDENTS.

No. 1307 of  
1879.*Tenures transferable by custom of country—Building tenures, Determination of transferable.*

The mere fact that a tenure is transferable under the custom of the district does not make it one which is not terminable by the landlord on sufficient notice.

**A**PPEAL from a decision passed by the Subordinate Judge of Hooghly, reversing the decree of the Moonsiff of Serampore.

In this case, it appears, that more than 20 years ago Nobin Chunder Kolya took ten cottahs of land from the plaintiff for the purpose of building a dwelling house thereon, and that he entered into possession and built a thatched house.

In 1875 the other defendant Chunder Sikhar Banerjee caused Nobin Chunder's interest to be put up for sale in execution of a decree which he had obtained against him. The holding was accordingly sold and purchased by the decree-holder himself.

The plaintiff now sued Nobin Chunder and the purchaser from him at the execution sale, in ejectment.

The Subordinate Judge found that the tenure, according to the custom of the locality, was of a transferable character; and that being so, he considered that the plaintiff "had no power to evict the tenant of such a tenure at his will and pleasure," and he accordingly dismissed the suit.

The plaintiff appealed to the High Court.

Baboo Hem Chunder Banerjee, Baboo Bama Churn Banerjee, and Baboo Umbica Churn Banerjee, for the Appellant.

Baboo Ashootnash Mookerjee, and Baboo Bipro Dass Mookerjee, for the Respondent.

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 SHAMA SUN-  
 DURI DABI  
 v.  
 NOBIN CHUN-  
 DER KOLYA.  
 Judgment.  
 PRINSEP, J.

The judgment of the High Court (1), which was as follows, was delivered by

PRINSEP, J. :—

The Subordinate Judge has found in this case that the tenure is not of a permanent character, but nevertheless one transferable under the custom prevailing in the locality. He, however, holds that being a transferable tenure, the landlord cannot evict the tenant at his will and pleasure, that is to say, in the present case, by service of a notice to quit. It appears to us that the Subordinate Judge is wrong in this opinion. The mere fact that the tenure is transferable under the custom of the country does not necessarily make it one which is not terminable at the will of the landlord. The judgment in the case of *Banee Madhub Banerjee vs. Joy Kissen Mookerjee*, 12 W. R., 496, on which the Subordinate Judge relies, does not support him in the view he has taken. We think, that on the finding of the Subordinate Judge, this tenure can be terminated on the service of a sufficient notice, but inasmuch as the notice upon which the plaintiff relies is said to have been served in 1875, we think that the present suit should terminate, and that a fresh notice should be served if the plaintiff still desires to evict the defendant.

The appellant is entitled to his costs.

[CRIMINAL JURISDICTION.]

March 2nd. IN THE MATTER OF KHERODE CHUNDER MO- } PETITIONER.  
 No. 27 of ZUMDAR . . . . . }  
 1879.

*Indian Penal Code (Act XLV of 1860), sections 196 and 471—Jurisdiction of Magistrate.*

A Magistrate has no power, under section 196 of the Indian Penal Code, to convict an accused person who has been found to have used as evidence a document which he knew to be a forgery, but is bound to commit him to the Court of Session, the offence being properly cognizable under section 471 of that Code—*Reg. vs. Oodeen Lall*, 3 W. R., Cr. Rul., 17, disapproved of.

THIS was an application to set aside a conviction passed under section 196 of the Indian Penal Code.

(1) PRINSEP and MACLEAN, J.J. •

The petitioner, it seems, was charged with having used as evidence in a case a document to which he had added the names of two of his servants as witnesses, and had changed the original date from 1281 to 1282, with a view to saving limitation.

The Magistrate, before whom the case was heard, found the charges proved, and convicted the petitioner. From this conviction an appeal was preferred on the ground that it was against the weight of evidence, and further that the Magistrate had no jurisdiction.

The appeal having been dismissed, the present application was made.

*Ghose and Baboo Aukhil Chunder Sen*, for the Petitioner.

The judgment of the Court (1) was as follows :—

It appears to us that this was properly a case cognizable under section 471 of the Indian Penal Code, and not under section 196, and that consequently the Magistrate had no jurisdiction to convict, but ought to have committed the prisoner for trial to the Court of Session. We observe that there is an early case, *Reg. vs. Oodeen Lall*, 3 W. R., Cr. Rul., 17, in which incidentally a conviction in a case somewhat resembling the present, appears to have held legal under section 196, but there the conviction had taken place before a Sessions Judge with the aid of a jury, and the question of jurisdiction did not arise. We are not aware that that *dictum* has been followed in other cases, and that was a ruling by a single Judge. We think the conviction must be set aside, and that the Magistrate should commit the prisoner for trial.

(1) *JACKSON and TOTTENHAM, J.J.*

1880  
In re  
KHERODE  
CHUNDER  
MOZUMDAR.  
Judgment.

## [ORIGINAL CIVIL JURISDICTION.]

1880  
March 15th.No. 39 of  
1880.

DOORGA CHURN DASS . . . . . PLAINTIFF;

AND

NITTOKALLY DASSEE AND ANOTHER . . . DEFENDANTS.

*Pauper, defence by, in formâ pauperis—Civil Procedure Code (Act X of 1877), section 401.*

A defendant may be allowed to defend a suit in *formâ pauperis*, although there is no provision to that effect in the Code of Civil Procedure.

IN this case the plaintiff sued for restitution of conjugal rights, and for an order that his wife, the defendant Nittokally, should return to his protection. It was alleged that her father, the defendant Boikuntonath Deb, and the defendant Chunder Mohun Banerjee had taken her away and were detaining her.

The defendant Boikuntonath applied to be allowed to defend the suit in *formâ pauperis*.

*Souttar*, for the Plaintiff.

*J. D. Bell* (Standing Counsel) watched the case for the Government.

*Souttar* called attention to the fact that there was no provision in the Civil Procedure Code for a defendant to sue in *formâ pauperis*.

In England, he said, a defendant in an action-at-law was never allowed to defend it as a pauper, though in Courts of Equity a defendant who was in state of poverty might obtain an order to defend in *formâ pauperis*.—Daniel's Ch. Pra., 140.

The applicant was examined, and it appeared that he was really a pauper.

Mr. Justice WILSON expressed an opinion that, although no provision was made in the Code to that effect, a defendant might, on his poverty being satisfactorily proved, be allowed to defend in *formâ pauperis*. He, however, took time to consider the matter, and in the end made the order asked for.

## [PRIVY COUNCIL.]

UGGODUMBA DOSSEE . . . . . APPELLANT ;

1880

AND

Feb. 28th,

ARAKANT BANNERJEE AND OTHERS . . . RESPONDENTS ;

*Res Judicata—Order of remand.*

In 1814, litigation commenced between a zemindar and his tenants by reason of his having dispossessed them of lands held under a *jote* tenure, and decree having been obtained by the tenants the zemindar assessed the *jote* lands at a rent. Subsequently this rent fell into arrear, and under a decree the *jote* lands were in 1836 sold in satisfaction of the arrears to J., who was put in possession in 1839. Another suit, which was pending between the tenants and their mortgagee, in which a question arose whether these *jote* lands were included in the mortgage, was decided in favour of the mortgagee in 1841. J., the then *jote* tenant, was no party to that suit, and continued in possession of his *jote* lands. Disputes arose, and by an order of the Sudder Court in 1845, the *jote* lands were directed to be put in possession of the mortgagee.

In 1856 a suit was brought by J.'s representative to set aside that order and to recover possession of the *jote* lands.

The Privy Council held that, as J., the *jote* tenant, was not a party to the suit under which the decree was made in 1841, the decree was not binding upon him or those deriving title through him, and remanded the case in order that the issue whether the land was parcel of the *jote* or not might be tried.

*Held*, that this order of remand was conclusive that the question of the title of the representatives of J. to the *jote* lands could not be re-opened.

[Judgment of the High Court affirmed.]

APPEAL from a decision passed by a Divisional Bench of the High Court at Fort William in Bengal.

*Argued*, for the Appellant.

*W. Arathoon*, for the Respondents.

The facts of this case are to be found in the report of the case *Banerjee vs. Puddomoney Dossee*, 10 Moore's I. A.,



1880  
 JUGGODUMBA  
 DOSSEE  
 v.  
 TARAKANT  
 BANNERJEE.  
 ———  
 Judgment.

476, and in the following judgment of the Judicial Committee (1) of the Privy Council:—

The earlier history of this long litigation, and the facts out of which it has arisen, are set forth in the report of the case when it was before this Board in 1866, which is to be found in the 10 Moore, page 476. It is not necessary to recapitulate those facts, though it will be necessary to refer to certain passages of the judgment delivered on that occasion.

The broad question to be determined between the parties is whether a considerable portion of land comprised within four villages belongs to a *jote* which the plaintiff claims to hold under the zemindars, who may be described as the Roy zemindars, or to a taluk of which the defendant Rasmoney Dossee, who is now represented by the appellant, was the unquestioned owner. If the title of both parties—the title of the plaintiff on the one hand to the *jote*, and the title of the defendant on the other hand—were admitted, this question would of course be simply that which occurs in every case of parcel or no parcel, viz., whether the land in dispute belongs to the one estate or to the other. The case, however, has come before their Lordships, complicated by a further issue. The result of the former appeal to Her Majesty in Council was that the judgments of two Indian Courts were reversed; the right of the plaintiff, notwithstanding those judgments, to maintain his suit was affirmed, and the cause remanded in order to try the principal issue, which had not been tried in the Courts below, of parcel or no parcel. Accordingly, when on the remand the cause came first before the Subordinate Judge, he settled only one issue, which was, in effect, whether the land in suit was parcel of the *jote* or of the taluk. At some period, it does not appear exactly when, but before he gave judgment, he seems to have either settled, or to have considered as open to the parties, the further issue whether the plaintiff purchased the *jote* as alleged by him.

The principal part of the evidence, taken before him on the remand, appears to have been addressed to that issue, which he Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH and Sir ROBERT P. COLLIER. •

decided against the plaintiff, and in favor of the defendant. When the cause went to the High Court upon appeal from his decision, the Judges of that Court intimated that this issue was no longer open to the parties, and that the Subordinate Judge's finding upon it afforded no ground for dismissing the plaintiff's suit. In an ordinary case it would, of course, have been open to Mr. Doyne to question the High Court's decision, and it would have been for their Lordships on this appeal to determine which Court was right; but on the opening of the case their Lordships intimated to him, that for the reasons which are now to be stated, he was precluded from raising the question involved in the issue by the former decision of this Board, and consequently that it was not open to him to go into that part of his appeal.

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JUGGODUMBA  
DOSSER  
v.  
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BANNERJEE.  
Judgment.

The cause came before their Lordships on the former occasion in this way:—In the Courts below certain issues directed to the question, whether the suit could be maintained, as well as one which the Court described as “the real matter in dispute,” being whether the land in suit belonged to the jote or to the taluk, had been settled; and it had been determined that the former alone should be tried in the first instance; the “real matter in dispute” being left to be tried thereafter, should it become necessary to do so. Of the issues in bar, one was whether the claim was barred by limitation. Another, which seems afterwards to have dropped out of the cause, was, whether, inasmuch as the validity of the deed of sale, under which the plaintiff claimed, was questioned, the proper stamp had been paid upon the suit; the second in point of order and the 34th, which was in these words:—“Whether or no the zemindar, Baboo Ramrutton Roy, and others, are carrying on this suit in the plaintiff's name,” seem both designed to raise the question whether the plaintiff's right of suit was not barred by reason of a former decision, which had been passed between his alleged vendors and the defendants. The lower Court in India held that both the plea of limitation and this plea, in the nature of *res judicata*, had been made out, and dismissed the suit on both grounds. Upon appeal the Sudder Court dealt only with the question of limitation, and finding that the plaintiff, or those through whom he claimed, though dispossessed at a later

1880  
JUGGODUMRA  
DOSSES  
v.  
TARAKANT  
BANNERJEE.  
Judgment.

date than that found by the Subordinate Judges had never been out of possession for a period of more than two years before the institution of the suit, confirmed the dismissal of the suit on that ground alone. The Board held that the Courts were wrong on the question of limitation, inasmuch as the plaintiff, or those through whom he claimed, had been in possession up to the 18th November 1845, the date of decision of Mr. REID, who was then one of the Judges of the Court of Sudder Dewanny Adawlut, there then remained the question whether the plaintiff was barred by the plea of *res judicata* upon which the Sudder Court had passed no judgment, and the Lordships had to deal with that question. What they say upon it is this: "The other point on which the Zillah Court decided against the appellant was that the matter was already adjudicated in a suit by which he was bound. It has been stated that the original purchaser, at the auction sale of the jote tenure, was to one Ramdhone Sircar. Before the sale he had instituted proceedings against the decree-holders under the title of taluk. Ramdhone Sircar purchased therefore *pendente lite*. He applied to be substituted in the suit in lieu of Juggut Chunder Rai, which application was granted. This litigation terminated in the Zillah Court in favor of Ramdhone Sircar, the jote tenant. From that decision Rasmoney Dosses appealed. On her appeal the Sudder Court reversed that decision. This was the decree of Mr. Reid of the 18th November 1845, which the suit seeks to set aside. On this Ramdhone Sircar instituted a regular suit against Rasmoney Dosses and others, claiming in substance the same relief which is sought by this suit. Pending that suit Ramdhone Sircar died, and his three sons Mohan Chunder Sircar, Anund Chunder Sircar, and Grish Chunder were substituted in his place on the Record. Pending this litigation the present appellant purchased the jote tenure from the sons of Ramdhone Sircar. He applied in his turn to be substituted on the record, and to conduct the suit. One of the sons, however, denied the purchase, and the Court refused the application. In a few days afterwards the cause was decreed for the defendant. It is alleged that the actual plaintiffs conducted their case negligently, if not collusively. On the argument before the

Lordships, the Attorney-General abandoned the case of fraud, but contended that the plaintiff was not barred by this decision; that he was not a party to the suit; and that his application to intervene in it having been refused, it would be unjust and inconsistent to hold him bound by the decree; that he followed so promptly on the refusal to allow him to intervene that he could not reasonably be expected in the interval either to appeal against the order refusing him leave to intervene or to institute a suit as supplemental to the one in which he sought to intervene. Their Lordships concur in this view of the subject. As the law allows a party interested to intervene in the suit, that right should not be rigorously dealt with. There is much danger in India of secret collusion. Their Lordships think that the defendants, who obtained their decree so shortly after the above refusal, in the absence of the party really interested in contesting the matter with them, should not be permitted to prevail by this objection.

1880

JUGGODUMBA  
DOSSER  
v.  
TARAKANT  
BANNARJEE.  
Judgment.

The question now is whether that was not a conclusive and final decision that the right of the plaintiff to maintain this suit was not taken away by the decree in Ramdhone's suit; and whether the order of remand did not imply that his title to the jote generally was not in the subsequent proceedings to be taken as established. It was argued that the defendants ought to be allowed to prove either that the kabalat, under which the plaintiff claimed, had never been executed, in which case the title to the jote would be still in the sons of Ramdhone, or that if it were executed, the plaintiff, by reason of his position in life, and want of means, was incapable of making the alleged purchase on his own account; and must be taken to have acted in the transaction as the mere creature of Ramrutton Roy and his co-sharers in the zemindary (for whom Ramdhone Sircar had also held *benamtee*); and that on either view of the case the plaintiff's right to maintain the suit would be barred by the decree against the sons of Ramdhone in their suit with Rasmoney Dassce. The case is thus presented in an alternative form. Taking the latter alternative, their Lordships observe that it raises the precise question of which the former decision of this Board disposed. The judgment of the lower Court, which was then

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JUGGODUNRA  
DOSSER  
v.  
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BAHAREJEE.  
Judgment.

under appeal (see Supplemental Record, p. 127), proceeds expressly on the ground that Juggut Chunder Roy, Ramdhone Sircar, and the plaintiff had all held *benamsee* for Ramrutton Roy, who was in fact, the person suing in both suits in the name of his creature. Again the question, whether there ever was a conveyance or not from the sons of Ramdhone Sircar might have been tried, and as far as their Lordships can see, was tried and determined in the plaintiff's favor in the former proceedings; and to allow that question to be raised again would equally be to re-open that which was decided by their Lordships on the former occasion.

The case being thus reduced to the broad question whether these particular lands are parcel of the *jote* tenure or of the taluk. The first question which arises is what was decided here with respect to possession on the former occasion. Their Lordships think it quite clear that the judgment delivered by Lord Justice TURNER must be taken to have decided that the plaintiff and those through whom he claimed were in possession from at least the 7th August 1839, and that there was no change of possession, from that time until the date of Mr. Reid's order of the 18th November 1845. This may raise a presumption of anterior possession but such possession of the *jotedars* claiming as purchasers at the sale of 1836 cannot be carried beyond the date of that sale, because up to that time, and at least from 1814, the Moonshees, as they are termed throughout these proceedings, were in possession both of the *jote* and of the taluk, holding the *jote* as a subordinate tenure under the zemindars, the Roys, and the taluk as a separate and distinct zemindary. There is, however, other evidence to show that the lands in question, when in the possession of the Moonshees, were parcel of the *jote*. On the remand a local inquiry was made by the Court Ameen. The Subordinate Judge seems to have treated his report with very little respect, but the learned Judges of the High Court, in their careful and elaborate judgment, have said that they see no reason to doubt its honesty or correctness, and that it is supported by certain old documents to which they are disposed to attach credit. Then there are the circumstances which certainly have not been disproved, that these Moonshees were some time between

1814 and 1819<sup>d</sup> dispossessed or interfered with by the zemindars ; that they then, being at the time the owners of both estates, brought their suit against the zemindars, seeking to be replaced in the enjoyment of the *jote*, and described the lands in dispute as part of that *jote*. The latter circumstance seems to their Lordships to be the more important, because it involved an admission against their interest, inasmuch as it was clearly more desirable for them to hold the lands as part of their independent taluk than as part of a subordinate tenure.

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JUGGODUMBA  
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v.  
TARAKANT  
BANNERJEE.  
Judgment:

Their Lordships, therefore, fully concur with the High Court in thinking that a very strong *primâ facie* title was made out by the plaintiff, which it lay upon the defendants to displace. Mr. Doyme has fairly, and their Lordships think on sufficient grounds, and without in any way abandoning the interests of his client, admitted that he cannot find in the record any evidence sufficient to have that effect.

Their Lordships desire to add the following observations with respect to the decision of this Board upon the former appeal. It was said that that appeal was heard *ex-parte*. Mr. Doyme candidly admitted that he could not on that ground dispute the effect of it. It is in their Lordships' opinion quite clear that it is impossible to allow the appellant to take advantage of her absence on that occasion, in order to re-open any question which either was expressly decided, or might have been raised and determined on that appeal. Their Lordships always regret to have to hear an appeal *ex-parte*, but their decision upon it when heard must stand as if all the arguments which the respondents, if present, could have raised upon the case, had been addressed to them. The absent parties must bear the consequence of their own neglects. Why the then respondents in this case did not appear in 1866, it is not for their Lordships to say ; they do not seem to have had the stock excuse of poverty and want of funds.

Their Lordships will humbly advise Her Majesty to affirm the decision of the High Court, and to dismiss this appeal with

## [CRIMINAL JURISDICTION.]

1880  
April 22nd.

**EMPRESS vs. KALA CHAND DASS AND OTHERS**

*Criminal Procedure Code (Act X of 1872), sections 505, 510—Bad livelihood—Security for good behaviour—Sureties—Cash Deposits.*

Seven persons were charged, under section 505 of the Code of Criminal Procedure, with being persons of notoriously bad livelihood. Two only were proved to have been ever convicted of any substantive offence, and the convictions proved against them took place 30 and 32 years before, but it appeared that they had, in 1867, been imprisoned for three years as budmashes in default of finding security.

The Magistrate, under section 510 of the Criminal Procedure Code, ordered each of the seven accused to find two sureties to the amount of Rs. 500, three of them to deposit in cash Rs. 1,000 each, two of them Rs. 500, and the remaining two Rs. 250, and in default to have rigorous imprisonment for one year.

The High Court *held* that it was illegal to require the accused to deposit cash instead of giving bonds as security for good behaviour, and that the order of the Magistrate as to sureties was prohibitive. It accordingly quashed the orders requiring the deposits of cash, and the finding of sureties and directed that six of them (it being found that as to the seventh the Magistrate acted entirely without jurisdiction) should enter into bonds for the good behaviour in the amounts which they were directed to deposit in cash.

The sections of the Procedure Code relating to budmashes should be exercised with extreme discretion.

**C**RIMINAL REFERENCE under section 296 of the Code of Criminal Procedure.

The terms of the reference were as follows :—

“The accused persons were charged under section 505, of the Criminal Procedure Code, with being persons of notoriously bad livelihood, and the Magistrate of the District, after holding a local enquiry at which he examined witnesses for the prosecution and also for the defence, found the charge established.

The Magistrate passed the following order :—“The order I now pass is that the prisoners Kala Chand, Ram Sagar, Nobin Haldar, Ram Kumar Dass, Poda Lochun, Raj Coomar Deb, and Ram Kumar Deb, find two sureties in Rs. 500 each for their good beha-

vour for one year under section 505, of the Criminal Procedure Code. They are also required to furnish their own recognizances, the amount to be deposited in cash, Kala Chand, Ram Sagar, and Ram Kumar Deb Sigdar for Rs. 1,000 each, Raj Kumar Deb and Ram Kumar Dass for Rs. 500 each, and Nobin Haldar and Poda Lochun, Vakeel, for Rs. 250 each. In default of compliance with this order, they will, under section 510, undergo rigorous imprisonment for the period mentioned."

1880  
 EMPRESS  
 v.  
 KALA CHAND  
 DASS,  
 Judgment.

The portion of the order, requiring the accused persons to deposit cash in lieu of a bond for good behaviour, appears to be bad in law.

The forms of the bond and security for good behaviour, which are to be taken by the Magistrate, are prescribed in the second Schedule annexed to the Code of Criminal Procedure, and I find no authority for requiring cash to be deposited in lieu of a bond."

The following judgments were delivered by the Court (1) :—

PONTIFEX, J. :—

PONTIFEX, J.

We agree with the Sessions Judge in this case that the order passed by the Magistrate, requiring the accused persons to deposit cash in lieu of taking a bond for good behaviour, ought to be set aside as bad.

As the case has come before us, I, speaking for myself, feel bound to make some observations on the Magistrate's decision. The Magistrate says that of the seven defendants, Nos. 1, 2, 6, and 7 have been before in jail as *budmashes*, but only two of them have ever been convicted of any substantive offence. The Magistrate further says that, "it occurred to him that it would be well that the defendants should be called on to show, *what if even hardly likely could be the case*, that in the opinion of such respectable men as Bhaokally affords, they were making efforts to retrieve their character."

I must observe that the assumption of the Magistrate shown in this paragraph scarcely indicates a proper frame of mind in which to commence a judicial trial of the defendants.

(1) PONTIFEX and McDONELL, J.J.



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 EXPRESS  
 v.  
 KALA CHAND  
 DASS.  
 Judgment.  
 POSTOFFICE, J.

Nor, if this was the disposition with which the case was approached, is it likely that "respectable men" would have willingly come forward in support of the defendants, and so drawn the suspicion of the Magistrate on themselves. But, be that as it may, it appears that the Magistrate, after taking evidence on the spot *against* the defendants, remanded, as he calls it, the case to head quarters and then took the evidence for the defence. The Magistrate's words are :—"For the defence, twelve witnesses have been examined, their number and the difficulty of securing their attendance in time rendering me unable to dispose of the case at a single sitting." It seems to me that if the evidence against the defendants was taken on the spot, and the taking of the greater part of the evidence for the defendants was adjourned to head quarters," this was a proceeding not very fair to the defendants.

The Magistrate further says : "Defendants 1 and 2 have some landed property acquired, it is not unjust to suppose, by the proceeds of a career of crime." Unless there was any evidence pointing that way, I feel bound to say it was extremely unjust to make any such supposition, and as a matter of fact there is evidence on the record showing that part at least of this landed property was inherited. But the whole tenor of the Magistrate's remarks shows that he did not approach or deal with this case as dispassionately as would have been desirable.

Again the Magistrate says : "As to the antecedents of the other three, or at all events of Ram Sagar, information would doubtless be forthcoming in the records of the Court of Session if the offices were not now closed for the holidays"—an assumption which appears to me to be purely gratuitous and extremely unfair. The Magistrate also says : "The office records, however, show convictions only in the case of Kalachand and of Ram Coomar Deb; of these, the first has been twice in 1844, and in 1850, convicted of theft, the second was convicted in 1848, and both of them with Raj Coomar were, in 1867, imprisoned for three years in default of finding security as *budmashes*." So that substantive offences were found against only two of the defendants, and these were committed and punished 30, 32 and 36 years ago, and were further expiated by three years imprison-

ment for default of security in 1867. But notwithstanding this expiation, these offences are now again paraded for the certain consequence of one more year's imprisonment. I cannot think that it is justifiable to work these sections in this manner. With respect to the defendant No. 5, the Magistrate finds "that he is what is called in Backergunge and Chittagong a 'torney', that is, he nurses for his own private profit petty quarrels into criminal charges, and negotiates in the interest of the accused the suppression of really heinous offences. To this reputable business he joins the profession of a *kobiraj*, so that (it is difficult to see the *sequitor*) he is on his own showing a man against whom society should be protected."

No doubt, No. 5 is, on his admission, as stated by the Magistrate, but which really is not borne out by the record, a by no means reputable character. But in my opinion section 505 is not intended to apply to a person of such character and reputation, and the Magistrate had no jurisdiction to deal with him under that section. And, speaking generally, the order passed by the Magistrate seems to me preposterous. The seven defendants are each required to find two sureties to the amount of Rs. 500 each, three of the defendants are required to *deposit* in cash Rs. 1,000 each, two of them Rs. 500 each and the remaining two Rs. 250 each, and in default to have *rigorous* imprisonment for one year.

With respect to the deposit we agree with the Judge that the order is illegal.

With respect to the sureties it is prohibitive, for it is scarcely likely that 14 sureties, in Rs. 500 each, would be forthcoming in a place like Bhaokalty. My own experience in Calcutta has shown me that respectable people in Calcutta who have to provide sureties upon grant of letters of administration, have to pay heavy sums to the sureties; and I can only suppose that it would be greatly more expensive for reputed *budmashes* to provide sureties for their good behaviour. So that it comes to this that the requirement of two sureties, to the amount of Rs. 500 each, of each of the defendants will, in effect, be inflicting a heavy pecuniary fine upon them in a case only of suspicion and detention.

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EMPRESS  
v.  
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DASS,  
Judgment.  
PONTIFEX, J.

1880  
 EMPRESS  
 v.  
 KALA CHAND  
 DASS.

*Judgment.*  
 PONTIFEX, J.

Moreover, if these cases are to be approached in the spirit with which the present has been decided, to become surety for a *budmash*, will, of itself, be sufficient evidence to convict the surety of being himself a *budmash*.

Surely the putting in force of these very stringent sections should be exercised only with extreme discretion. In the present case the Magistrate points out incidentally the far more proper means of prevention. In the village in question he says "so bad indeed a few months back had things become, that it was considered necessary to station two constables who still remain there \* \* \* the accused are well known to have been in the habit of moving about the khals at night in long canoes driven by paddles, whilst thefts were of frequent occurrence. *This of course was before the arrival of the Police whose removal would simply be the signal for a return to the old state of things.*"

We quash the order of the Magistrate, directing the defendants to deposit cash, and to provide sureties, and in lieu thereof we direct the defendants Nos. 1, 2, 3, 4, 6 and 7, but not defendant No. 5, to enter into bonds for their good behaviour in the amounts which they were directed to deposit in cash. All the defendants will be immediately released from the rigorous imprisonment which it appears they are now undergoing for default in providing sureties and depositing cash.

McDONELL, J. McDONELL, J. :—

I concur.

## [CIVIL APPELLATE JURISDICTION.]

HURMUZI BEGUM AND OTHERS (DEFENDANT). APPELLANT;

AND

HIRDAY NARAIN (PLAINTIFFS) . . . . . RESPONDENTS.

1880.  
March 4th.Nos. 43 & 70  
of 1879.*Limitation Act (XV of 1877), Schedule II, Art. 132—Malikana, Nature of.*

Malikana being an annually recurring charge, a suit for payment of money due in respect thereof may, under Art. 132 of Act XV of 1877, Schedule II, be brought within 12 years from the date on which such money became due.

**A**PPEALS from a decision passed by the officiating Second Subordinate Judge of Bhaugulpore, affirming the decree of the Moonsiff of Monghyr.

The plaintiff in the first case sued for Rs. 248-13-9 as being due to him in respect of a malikana allowance charged upon certain mousahs, which belonged to the chief defendant, Hurmuzi Begum. The allowance was formerly payable to the defendants Doorga Prosad and Ram Kissen Dass, but was by these persons sold to the plaintiff.

The years for which the allowance was claimed were 1281-1284, F. S.

The defendants alleged that no payment had been made in respect of the allowance since the 1265 F. S., and pleaded that the suit was therefore barred by limitation.

No evidence was given to show that there had been any payment of malikana within 12 years previous to the suit.

The Moonsiff, and on appeal the Subordinate Judge, held that the suit was not barred.

The other case (No. 70) was similar, and the judgment in the first was declared to apply to both cases.

The defendant Hurmuzi Begum thereupon preferred a second appeal to the High Court.

Baboo Saligram Singh, for the Appellants.

Moonahce Mahomed Yoosoof and Mr. M. L. Sandel, for the respondent.

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HICKINZ

BROTH

v.

HJEDAY

NARAY.

Judgment.

The judgment of the High Court (1) was as follows :—

We think that there is no difficulty about the point which has been raised in these appeals.

We have been referred by the appellants' pleader to certain cases which were decided under the Limitation Act of 1859. (See *Heernand Skoo vs. Mussamat Ozeem*, 9 W. R., 102; *Gobind Chunder Rai vs. Ram Chundra*, 19 W. R., 95; and *Boli Singh vs. Mussamat Nehum Bhee*, 3 B. L. R., App., 102, affirmed on appeal, 12 W. R., 498.) But those cases turned upon the particular language of clause 12, section 1, of that Act of 1859, which seemed to make it imperative upon the Courts to deal with malikana as an interest in land, and to treat a claim for it as barred, if not made within 12 years after the last receipt by the proprietor.

But the present cases are governed by the Limitation Act of 1877, which like, its predecessor, Act IX of 1871, has made special provision for cases of this kind. Article 132, of Schedule II, expressly provides, that malikana as well as other sums charged upon immoveable property may be sued for within 12 years, not from the time of the last payment of the malikana, but "from the time when the money sued for becomes due."

Now malikana is an annually recurring charge, and it is quite clear that the sums sued for in this case became due within 12 years of the commencement of this suit, and consequently that the Court below was right in giving the plaintiff a decree.

Both appeals therefore (Nos. 43 and 70) are dismissed with costs.

There were also two other appeals, Nos. 6 and 7, which were dismissed for default of appearance in the Court below; and the first question which we had to decide in those cases was, whether they ought to be heard at all. But as upon the merits those appeals would depend upon the same question as that which we have just decided, it is no use to go into the preliminary question; and these appeals therefore (Nos. 6 and 7) must be dismissed with costs.

(1) GARTH, C.J., and MACLEAN, J.

## [CIVIL APPELLATE JURISDICTION.]

JUGJEEBUN GUPTA (JUDGMENT-DEBTOR) ... APPELLANT ;

AND

HURRO KUMAR PAL . . . . . RESPONDENT.

1880  
March 8th.No. 280 of  
1879.

*Civil Procedure Code (Act X of 1877), sections 344, 351, 354, 588 (17)—  
Insolvent, Application to be declared—Insolvent, order refusing  
application to be declared.*

An order under section 351 of the Civil Procedure Code, disallowing an application to be declared an insolvent, is not appealable.

*Per Curiam* :—The appeal allowed under section 588, clause 17 of the Procedure Code (as amended by Act XII of 1879,) so far as an order under section 351 is concerned, appears to be on behalf of a judgment-creditor only.

**A**PPPEAL from an order passed by the Judge of Sylhet.

Baboo Kadar Nath Paulit, for the Appellant.

Baboo Unnoda Prosad Banerjee, for the Respondent.

The facts sufficiently appear from the judgment of the Court (1), which was delivered by

MORRIS, J. :—

MORRIS, J.

A preliminary objection is taken by the decree-holder, respondent, that no appeal lies in this case ; because the order appealed against is not an order passed under section 351, declaring the judgment-debtor, appellant, to be an insolvent. It is an order disallowing his application to be declared an insolvent. Looking at the strict terms of section 351, it seems to us that an order under that section can only be such an order as that section in its latter paragraph prescribes, namely, an order declaring the applicant under section 344, to be an insolvent and also appointing a receiver of his property, or in case of appointing a receiver, discharging the insolvent. This

(1) MORRIS and PRINSEP, J. J.

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 J. G. J. J. J.  
 GUPTA  
 J.  
 MURDO  
 KUNAW PAL  
 Judgment.  
 MOWERS, J.

view is supported by the terms of section 354, which says that:—  
 “Every order under section 351 shall be published in the local  
 “Official Gazette and shall operate to vest in the receiver all  
 “the insolvent’s property (except the particulars specified in  
 “the first proviso to section 266), whether set forth in his  
 application or not.” From these words, it is clear that it  
 was never intended that every order disallowing an applica-  
 tion to be considered an insolvent, should be published in the  
 Gazette.

The appeal allowed under section 588, clause 17, so far as  
 an order under that section (351) is concerned, appears to  
 be on behalf of the judgment-creditor only. The amending  
 Code like the former Act. VIII of 1859, allows no appeal to  
 the judgment-debtor whose application to be considered an  
 insolvent, and to be discharged as such is disallowed.

The appeal is dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

March 1st.

No. 183 of  
 1879.

NOBAN NASYA AND ANOTHER (DEFENDANTS) . APPELLANT;

AND

DHON MAHOMED SIRCAR (PLAINTIFF) . . RESPONDENT.

*Registration Act (III of 1877), sections 17 (h) and 23—Agreement to execute a conveyance. Registration of, when treated as the conveyance—Limitation.*

The defendant entered into a written agreement to execute a conveyance of certain land to the plaintiff within 30 days from the date of such agreement, it being provided that, in default of the conveyance being executed, the agreement itself should be treated as the conveyance.

Default was made, and more than four months after the date of the execution of the agreement, the plaintiff applied to have it registered.

*Held*, that no conduct of the parties, however much it might alter the character of the document, could affect the limitation laid down by section 23 of the Registration Act, and that the agreement, to execute the conveyance having become a conveyance, could not under that section be accepted for registration.

**A**PPEAL against an order passed by the officiating Judge of Rungpore, reversing the order of the Moonsiff of Nilphamari, remanding the case to the Moonsiff.

Baboo *Nullit Chunder Sen*, for Appellants.

Baboo *Sree Nath Dass*, for Respondent.

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 NOBAN  
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 MAHOMED  
 SIRCAR.  
 Judgment.

The facts sufficiently appear from the judgment of the Court (1), which was as follows :—

This was a suit brought under section 77 of the Registration Act, III of 1877, to obtain a decree directing the registration of a document which had been refused by the Registrar. The document in this case was one falling within section 17, Cl. (h), and was a bynanama declaring the right of the plaintiff to receive a conveyance within 30 days from the execution of that deed, or in default the bynanama should be considered as such conveyance.

The defendant apparently refused to execute the conveyance, and the plaintiff, more than four months after the date of the execution of the deed, applied for registration of the bynanama.

The District Judge on appeal considers that the right to obtain registration, dated from the default of the defendant to execute the conveyance, and that the bynanama having then become a conveyance, the term for applying for registration commenced on that date. It is quite clear, however, that the view taken by the District Judge is erroneous, because section 23 declares that ordinarily no document except a will "shall be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution." No conduct of the parties, however much that might alter the character of the document, could affect the term of limitation laid down by this section. The deed not having been presented for registration within four months from the date of its execution, it could not be registered. The order of the District Judge is therefore set aside, and the suit dismissed with costs in this Court and in the Lower Appellate Court.

(1) PRINSEP and MACLEAN, J.J.



## [CIVIL APPELLATE JURISDICTION.]

1880  
March 8th.

LUCHMUN BHARTI . . . . . APPELLANT;

AND

No. 198  
of 1878.

DUKHARAN BHARTI . . . . . RESPONDENT.

*Hindu Wills Act (XXI of 1870), section 2—Wills of Hindus executed prior to September 1870.—Probate.*

The only powers conferred on Mofussil Courts being in respect of wills made on or after the 1st day of September 1870, probate of a will, made by a Hindu prior to that date, cannot be granted by a Mofussil District Court.

**A**PPEAL from a decision passed by the Judge of Sarun.

In this case the appellant applied for probate of the will of one Mobarik Bharti, a Mohunt, executed on the 13th Kartic 1253.

The appellant was the junior chela of the deceased Mohunt, and executor under the will of which probate was sought.

The District Judge refused to grant probate, whereupon an appeal was preferred to the High Court.

Baboo Chunder Madhub Ghose, for the Appellant.

Baboo Judoonath Sahoy, for the Respondent.

The judgment of the High Court (1), which was as follows, was delivered by

PONTIFEX, J. PONTIFEX, J. :—

We think that the Court below has rightly refused to grant probate of the will in this case. The District Mofussil Court had no power to grant probate of a Hindu will until Act XXI of 1870 was passed, and by that Act the only powers given to the Mofussil Courts are in respect of wills made "on or after the 1st day of September 1870," as stated in the Act.

We think that the appeal must be dismissed with costs.

(1) PONTIFEX and McDONELL, J.J.

## [CIVIL APPELLATE JURISDICTION.]

MOHI CHOWDHRY (PLAINTIFF) . . . . . APPELLANT; Nos. 259 to  
 AND 261 of  
 DHIRO MISSRAIN (DEFENDANT) . . . . . RESPONDENT. 1879.

*Evidence Act (1 of 1872) section 35—Measurement Papers prepared by  
 Butwara Ameen.*

The measurement papers, prepared by a Butwara Ameen deputed by the Collector to make a partition, do not come within section 35 of the Evidence Act.

**A**PPEALS from a decision passed by the Subordinate Judge of Bhagulpore, modifying a decree of the Moonsiff of Banka.

Baboo Taruk Nath Sen, and Baboo Jogesh Chunder Dey, for the Appellant.

Baboo Troilokhyo Nath Mitter, for the Respondent.

It is unnecessary to set out more than the judgment of the High Court (1), which was as follows:—

MITTER, J.:—

MITTER, J.

We do not think we ought to interfere in these cases.

It is only necessary to notice one of the grounds that have been urged before us, the others being merely objections against findings of fact. That ground is that the Lower Appellate Court is in error in not holding that the measurement papers, prepared by the Ameen deputed by the Collector at the time of the partition of the mehal in which the lands in suit are situated, should have been treated as evidence *quantum valeat* upon the question of the rent payable by the defendant tenant to the landlord.

We do not think that this contention is valid. The learned counsel for the appellant refers to section 35 of the Evidence Act in support of his contention. But that section has nothing to do

(1) MITTER and TOTTENHAM, J.J.

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with the question before us. That section refers to any public other official book, register or record which is kept up in accordance with any directions of law or in performance of a duty specially enjoined by the law of the country. The measurement papers, prepared by a Butwara Ameen, do not come within the description given in section 35. We, therefore, dismiss all the appeals with costs.

## [CIVIL APPELLATE JURISDICTION.]

March 23rd.

No. 212 of  
1878.

RAI SHEWAK RAM (PLAINTIFF) . . . . . APPELLANT  
AND  
BHOWANI BUKSH SINGH AND OTHERS } RESPONDENTS  
(DEFENDANTS) . . . . .

*Alienation by tenant for life, suit to set aside—Purchase money, Repayment*

By a petition filed in 1830, N, a Hindu, asked that certain property specified in a schedule to the petition which had up to date been in possession of himself and his ancestors, should be placed in the Collectorate books in the name of his daughter D, and that on the decease her daughters and other heirs should be heirs.

In 1837, N acquired shares in a mouzah called K. He died in 1838, and the petition was subsequently held by the Privy Council to be a testamentary instrument.

D sold the shares in mouzah K, and invested the proceeds in another mouzah. In a suit by a son of K's daughter against the purchase to set aside the sale by D, the Subordinate Judge held that he was bound, in the first instance, to repay the whole of the purchase money to the defendants. He further held that the after-acquired property passed by the petition.

The High Court upheld the first finding of the Subordinate Judge but expressed a doubt (it not being necessary to decide the first finding) whether there was no cross-appeal, whether the petition could pass after acquisition of property.

**A**PPEAL from a decision passed by the Subordinate Judge Sarun.

The plaintiff in this case sued to set aside a sale executed by Rani Dhun Koer, the widow of Rai Kilika Pershad, and to recover possession of the lands sold. The plaintiff was the son and daughter of the Rani.

It seems that the title of Rani Dhun Koer to the properties in question was as follows :—On the 16th August 1830, Rai Hur Narain, the father of her husband, presented a petition to the Collector of Patna, in the following terms :—

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SINGH.

Statement.

“The entire and whole villages and orchards, etc., \* \* \* have been, up to the present time, in right succession in the possession of our ancestors \* \* \* \* As in 1229 F. S., Rai Kalika Pershad, my son, died, and recently in 1237 F. S., Rai Gunga Pershad, my youngest brother, with his wife died, leaving no issue, and my wife too died before, only Mussamut Rani Dhun Koer, widow of Rai Kalika Pershad, who too has no other heir but her two daughters born of her womb, viz., Mussamut Shabitri and Mussamut Dulari, is my heiress. There is not nor shall be any other heir and owner of the property but Rani Dhun Koer \* \* \* \* As there is no faith to be put upon the stability of one's life, I pray that the Court will be pleased to cancel my name from the column of proprietorship, and rent of the revenue-paying villages and the revenue-free orchards, specified at the foot of this petition, in the district of Patna, and in the place of my name to record that of Rani Dhun Koer in respect of the property and rent. In future, too, the aforesaid Rani has got, and shall have those daughters aforesaid with their descendants with whom they may be blessed by God after their marriage, as heirs and owners. Next, as long as I live I shall have the management and superintendence of the village affairs and law suits and the arrangement of the household works in the same way as I have at present got.”

Then followed a list of the properties referred to.

On the 23rd October 1830, by order of the Collector Rai Hur Harain's name was expunged and that of Rani Dhun Koer substituted on the records of the Collectorate.

Mussamut Shabitri died in 1835. Rai Hur Narain on the 1st March 1838. Bibee Dulari in 1847, leaving her husband, Rai Lutchmun Pershad, and an infant son, the present plaintiff.

The Privy Council, in the case of *Mahomed Shumsool vs. Sheeram*, L. R. 2 I. A. 7, held the petition above set out to be a documentary document.

The property in question was not acquired until 1837, and con-

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 —  
*Argument.*  
 —

sequently could not have been set out in the list appended to the petition in 1830.

The Subordinate Judge as to this says:—"It is not disputed that she, Rani Dhun Koer, succeeded to the property in dispute immediately after the death of Rai Hur Narain. \* \* \* \* I conclude that she derived her title to this property under the aforesaid will of Rai Hur Narain, although the property in question was acquired by him subsequent to the date of the will."

There was no cross-appeal as to this finding of the Judge.

It appeared that before the sale of the disputed property, which it was sought to set aside, that Rani Dhun Koer held certain shares in two mouzahs called Busuntpur and Korain, Enayet Rousul and Mussamut Bibi Amena being the other shareholders. These persons sold their share in Busuntpur to Rani Dhun Koer, and their share in Korain to the defendants, and at the same time Rani Dhun Koer sold her share in Korain also to the defendants. The result of these transactions was that instead of being a part owner of two mouzahs, Rani Dhun Koer became the sole owner of one mouzah, viz., Busuntpur. In order, however, to bring about this result, Mussamut Rani Dhun Koer had to expend a large sum out of her own pocket. The Subordinate Judge expressed no opinion whether the sale had been for the advantage of the estate or not there being no evidence on the point; but he considered that the position of the Rani was much like that of a Hindu widow, and that accordingly she had no power to execute the sale in question. He accordingly gave the plaintiff a decree for possession, but upon condition of his refunding the whole of the purchase money to the defendants.

The plaintiff appealed, upon the ground that the Court had no power to impose that condition upon him.

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Baboo Chunder Madhub Ghose, and Mr. M. L. Sandel, for the Appellant.

Munshi Mahomed Yusoof, and Baboo Saligram Singh, for the Respondents.

Baboo Chunder Madhub Ghose.—The Privy Council have held that under the petition of 16th August 1830, Rani Dhun Koer

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took only a life interest. She had no power, therefore, whether for the advantage of the estate or not, to make the sale in question. 1880  
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Judgment.

[PONTIFEX, J.—The document in question raises a nice point of law which has never been decided, *viz.*, whether property acquired after its execution could pass under it as under a testamentary document.]

The question was not raised in the Court below, nor does it arise now.

[PONTIFEX, J.—It is doubtful whether your suit will lie. You are suing in ejectment and must prove an absolute title. The question is whether that document could give you a good title.]

That question, I submit, does not arise, for the Subordinate Judge has held that Rani Dhun Koer's title to this property was derived from the petition, although it was acquired subsequently to the date of its execution, and there has been no cross-appeal against that finding.

It is not enough that the defendants should have given value for the land.

The respondents were not called upon.

The judgment of the Court (1), which was as follows, was delivered by

PONTIFEX, J. :—

PONTIFEX, J.

We think that the decision of the Court below must be affirmed. We agree with the Subordinate Judge in thinking that the defendant has proved that the money which he paid to Rani Dhun Koer, for the purchase of the undivided shares in the estate now sued for by the plaintiff, was laid out by her in the purchase of outstanding shares in another estate to which the plaintiff has succeeded, and of which he is now in possession as her heir; and further that the purchase of outstanding shares, so made by Rani Dhun Koer, was really beneficial to the plaintiff, inasmuch as he thereby instead of inheriting undivided shares became sole owner of a more valuable property. Even so we did not agree with the Subordinate Judge in thinking

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that the evidence did prove this, we are of opinion the defendant would, on a broader ground, be entitled to insist that so long as the plaintiff is in possession of any property as the heir of Rani Dhun Koer he is bound, in seeking to set aside the sale by her, to repay, so far as the estate inherited by him from Rani Dhun Koer will go, the sum originally paid by the defendant, before he can take possession of the property conveyed by the Rani.

The plaintiff claims, under a petition of Rai Hur Narain, filed in the year 1830, under which Rai Hur Narain asked that certain property in the Province of Behar, which had up to that moment been in the possession of his ancestors, and afterwards in his possession and occupation, and which was specified at the foot of his petition, should be placed in the name of his daughter-in-law, Rani Dhun Koer, and in that petition it was stated that after Rani Dhun Koer's decease, her daughters and other heirs should take as heirs.

The plaintiff is a grandson of Rani Dhun Koer, by one of these daughters, and he claims to be entitled under the limitation in this petition. This petition has been held by the Privy Council, in the case reported in L. R. 2 I. A. 7, to be a testamentary instrument. If the plaintiff claims under the limitations in the petition he ought to have proved that he was in existence during the lifetime of Rai Hur Narain, for if he was not in existence at that time he could not, according to many decisions of this Court, take under the instrument. But still he might be entitled to take, as the heir of his mother who did take under the instrument. Either under one title or the other he has a right to come to this Court and to insist upon the decision of the Privy Council, to which I have referred, as showing that Rani Dhun Koer, being only a tenant for life, had no power to give an absolute title to this property by a deed of conveyance if it passed under the petition of Rai Hur Narain. But it is to be observed that the Privy Council judgment related to a portion of the ancestral property of Rai Hur Narain which was specified at the foot of the petition. The property, the subject of the present suit, was not purchased by Hur Narain until the year 1837, some six or seven years after the date of his petition,

therefore it could not be specified in the details at the foot of the petition, nor could it have been according to the recitals in that petition in the possession of Hur Narain at that time.

We have very considerable doubts whether that petition, although a testamentary instrument, as has been held by the Privy Council, would pass after-acquired or unspecified property. If it is it did not pass the after-acquired property, which is the subject of this suit, then the plaintiff could neither sue as heir under the limitations of the instrument, nor as heir of his mother; and he could only claim title to it as heir of Rai Hur Narain when limitation might apply.

That question, however, has not been raised by the defendant in the Court below or in this Court, and it has only incidentally been mentioned in the judgment of the Court below. We think, therefore, that as there is no cross-appeal, no objection can be raised on that point now.

We affirm the decree of the Court below, and dismiss this appeal with costs.

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*Judgment.*

PONTIFEX, J.



## [PRIVY COUNCIL.]

1879  
December 5th.

DRIG BIJAI SINGH . . . . . APPELLANT;

AND

GOPAUL DUTT PANDAY . . . . . RESPONDENT.

*Birt tenures—Act XVI of 1865—Act XIII of 1866—Birtah, Suit by—  
Limitation.*

A suit by a Birtah in respect of his tenure is cognizable under Act XVI of 1865, and Act XIII of 1866, notwithstanding that he may not have been in possession in 1855.

[Judgment of the Judicial Commissioner of Oudh affirmed.]

**A**PPEAL from a decision passed by the Judicial Commissioner of Oudh.

The facts of the case will be found in the judgment of their Lordships of the Judicial Committee (1), which was follows:—

In this case the plaintiff made a claim to a settlement in virtue of his under-proprietary right, which he describes as that of a “birt zemindary,” in 28 villages; but that claim has now been reduced to a claim in respect of two villages and half of a third. It was at first dismissed by the Settlement Officer, on the ground that inasmuch as plaintiff did not prove that he had been in possession in 1262 and 1263 Fuslee, in other words in the year 1855, the year before the annexation of Oudh, his claim could not be entertained. The Commissioner of Oudh, not being satisfied with the decision on this ground, remanded the case; and upon remand, first the Settlement Officer, and secondly the Commissioner, found that the plaintiff was entitled to the right he claimed, which is sometimes described as a “birt shankallap” right, sometimes as a “shankallap” right, (some kinds of shankallap being almost identical with that of

(1) Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, Sir ROBERT P. COLLIER.

ome being different from it), and an under-settlement  
 creed to him. The Judicial Commissioner, in pursuance  
 ver which he possessed, allowed an appeal to this Board  
 point of law, which he states to be whether paragraph  
 ling 5 of the Judicial Commissioner which he sets out,  
 was not correct. The ruling is in these terms :—" In  
 estigation of this and all cases of the same nature it  
 remembered that the extension of the term of limitation,  
 y Act XVI of 1865, is founded only on the agreement of  
 kdars, and does not apply to tenures originating in favor.  
 ant, who cannot prove possession of his shankallap holding  
 12-1263 Fuslee has no *locus standi* in Court." This  
 appears to be based upon a circular of 1861, which their  
 ips will assume to have had, at the time, the force of law.  
 ssage in that circular, on which the ruling is supposed to  
 aded, are principally these. The first section enacts :—  
 gh the settlement recently concluded with the talukdars  
 n declared final and perpetual, subject only to revision of  
 ent, it has at the same time been provided that the rights  
 under-proprietors, or parties holding intermediate interest  
 and between the talukdar and the ryot, shall be main-  
 as these rights existed in 1855." Then follows section  
 ch relates to birt tenures, and is in these terms :—Where  
 teeah has lost possession there is no more to be said.  
 not to restore it to him. But the Chief Commissioner  
 ly of opinion that the birteeahs, who are found in direct  
 ment with the State at annexation, or who have uninte-  
 y held whole villages on the terms of their pottahs under  
 kdars, must be maintained in the full enjoyment of their  
 in subordination to the talukdars." Then come other  
 which illustrate the meaning of birt. Section 25 says :—  
 meaning of the term ' birt ' is a ' cession. ' It was the  
 s of the proprietary rights subordinate to the talukdar on  
 conditions as to payment of rent which were held to be  
 , though undoubtedly often violated by superior power."  
 26 runs thus :—" Instructions are also required regard-  
 treatment of shankallap at settlement. Some shankallap  
 in the same nature as birt, and therefore will be governed

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 —  
*Judgment.*  
 —

by the same rules ; but it differs so far from ' bai-birt' that it is a condition of the former tenure that the talukdar can redeem at any time by repaying the purchase-money. The option availing himself of this condition should be afforded him settlement. Other ' shankallap,' that which is styled ' kobshust' is usually given to Brahmins and Pundits, is a pure maafee tenure given by the talukdar, and will be treated like other rent-free grants by talukdars." The latter words refer us back to section 20, which is in these terms :—" Those birts conferred by favor, ' regatte' as they are styled, in contradiction to the former bai-birts, are not birts in their essential characteristics, but are identical with the rent-free grants made by talukdars, and therefore liable to resumption by them at regular settlement, where the Government will take its full share of the rental, as has already been explained in paragraph 14 of the Maafee Rules."

Their Lordships observe that the ruling referred to by the Judicial Commissioner draws a distinction in reference to the application of the term of limitation (as it is called) to birt tenure and to tenures in the nature of shankallap, which are to some extent different from birt tenures and are assumed to be held at the option of the talukdar ; but their Lordships find no such distinction in the circular of 1861. The words treated as words of limitation in section 24 apply to all birt tenures. If a shankallap be a birt tenure they apply to it ; if it be not a birt tenure they do not apply to it, and it follows that there is no term of limitation in the Regulation applicable to shankallaps. But it must be assumed for the present purpose that this is a shankallap to which the term of limitation, as it is called, applies ; that is to say, that it is a shankallap of the nature of a birt, which seems to be the effect of all the holdings in this case.

Sections 1 and 24 enact in effect that if a birteeah is out of possession in the year 1855 his claim cannot be recognised. They are not in the technical sense enactments of limitation though their effect is in some respects the same, viz., to prevent the owner of a birt tenure being heard to support his claim ; and they appear to be treated as enactments of limitation by the authorities in Oudh, and to some extent by the Legislature itself. We then come to a statute, XVI of 1865, which is intit-

"An Act to remove doubts as to the jurisdiction of the Revenue Courts in the Province of Oudh." Section 5 is in these terms: "No suit relating to any under-tenure which shall be cognisable in any Revenue Court under this Act," (and claims of this kind come under that category,) "shall be debarred from a hearing under the rules relating to the limitation of suits in force in the Province of Oudh, if the cause of action shall have arisen on or after the 13th February 1844," that is, twelve years before the annexation of Oudh, which occurred on the 13th February 1856. Act XIII of 1866 followed, which is very much *in pari materie*. The 1st section, after re-enacting in almost the same words the provisions of the 5th section of the former Act, goes on to say, "And any suit or appeal relating to any tenure, and cognizable as aforesaid, which may have been rejected or dismissed upon the ground that the suit was barred under the said rules, may be revived and heard on the merits if the cause of suit shall have arisen on or after such day," that day being the 13th February 1844. It appears to their Lordships that whether the provision in the regulation referred to be considered a provision of limitation or not, it was in effect repealed by these statutes, and that the suit of a birteeah became cognizable notwithstanding that he may not have been in possession in 1855. Therefore, as far as any objection could be raised on the question of limitation, their Lordships are of opinion, that these two statutes are an answer to it.

But it has been contended that the disability, which it is said the plaintiff labours under to prove his title, is not in effect a disability under a statute of limitations, but a disability affecting the title itself. Act No. XXVI of 1866 is relied upon for this purpose. It is entitled, "An Act to legalise the rules made by the Chief Commissioner of Oudh for the better determination of certain claims of subordinate proprietors in that Province;" and it enacts, "whereas certain rules have been made by the Chief Commissioner of Oudh for the better determination of certain claims by persons possessed of subordinate rights of property in the territories subject to his administration; and whereas it expedient that such rules shall have the force of law, it is hereby enacted, as follows:—1. The rules for determining the

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PANDAY.  
Judgment.

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 SINGH  
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 DUTT  
 PANDAY.  
 —  
*Judgment.*  
 —

conditions to which persons possessed of subordinate right of property to taluqs in the territories subject to the administration of the Chief Commissioner of Oudh, shall be entitled to a sub-settlement of lands, villages, or sub-divisions thereof they held under taluqdars on or before the 13th February and for the determining the amounts payable to the taluqdars of such subordinate proprietors, which rules were made by the Chief Commissioner sanctioned by the Governor-General in Council, and published in the *Gazette of India* for 1st September 1866, and which are republished in the schedule to this Act are hereby declared to have the force of law."

It has been contended that the rules which have the force of law under this schedule bar the plaintiff's claim. The chief reliance has been placed upon sections 1 and 2. The first section is to the effect that:—"The extension of the term of limitation for the hearing of claims to under-proprietary rights in land must involve no alteration in the principles hitherto observed in the recognition of a right to sub-settlement." Rule 2 goes on to say:—"When no rights are proved to have been exercised or enjoyed by an under-proprietor during the period of limitation, beyond the possession of certain lands as seer or nankar. No sub-settlement can be made. But the claimants will be entitled, in accordance with the rules contained in the Circular Orders which have hitherto been in force in Oudh upon this subject, to the recognition of a proprietary right in such lands." That does not apply to this case. "To entitle the claimant to obtain a sub-settlement he must show that he possesses an under-proprietary right in the lands of which the sub-settlement is claimed, and that such right has been kept alive over the whole area claimed within the period of limitation." So far it appears to their Lordships that the finding of the Courts is in favor of the plaintiff. He has not taken to have kept alive his rights until he was ousted in the year 1851, which their Lordships find upon the evidence of the time when he was ejected by the Rajah. Then follow the words on which reliance has been placed. "He must show that he either by himself or by some other person or from whom he has inherited, has, by virtue of his under-proprietary right and not merely through privilege granted

it of service or by favor of the taluqdar, held such lands contract (pucka) with some degree of continuousness since village came into the talooka ;” and the next section explains is meant by “some degree of continuousness.” It has argued that, inasmuch as this is a shankallap tenure of the just description and held merely by favor, and not as of the plaintiff is excluded by the above words. Theirships are of opinion, however, that he is not so excluded ; adopt the findings of fact of the different Courts. The of the plaintiff is treated in the first place by the Settlement Officer, who originally dismissed it on the grounds which been stated, as a claim not to kooshust, but to birt allap. The judgment of the first Court upon remand is is effect :—“I consider it proved that there were five allap villages held by the plaintiff’s family ; that about Fusly” (it is agreed that that should stand 1258 Fusly) lost possession when Jadunath executed the conditional of sale. There is proof that plaintiff held his share tely, from the defendant’s own written note on the waji- presented by Jadunath ; and as the defendant neglects duce the deed, there is no evidence to show that Jadunath could legally convey the rights of Gopal Dutt that the had no right to eject him in 1856 Fusly, and he is now d to regain possession and to hold as an under-proprietor.” decision is confirmed by the Commissioner Mr. Capper. appears to their Lordships that the effect of the finding is he plaintiff did hold, not merely in the words of the n, “through privilege granted on account of services or by of the taluqdar,” but by an under-proprietary right is distinguished from a holding through village in favor ; e was entitled to hold, not merely during the will of the ar, to which the latter part of the section appears to point, *in invitum* ; and their Lordships are of opinion that from ngth of his holding, which appears to be considerable, and umstances which have been found in the case, it may be inferred that he held pucka or under contract, or at ts under an arrangement from which a contract might be . That being so, their Lordships are of opinion that

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*Judgment.*  
 —

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PANDAY.

*Judgment.*

he is not excluded, by the words which have been read, from the right of coming before the Court and proving this case.

It has not been seriously disputed that if this be so, he is held with that degree of continuousness which is required by the Act.

For these reasons their Lordships are of opinion that the decision appealed against is right, and they humbly advise Her Majesty that the judgment of the Commissioner be affirmed.

## [PRIVY COUNCIL.]

VENKATA NARASIMHA APPA ROW . . APPELLANT ;  
 AND  
 NARAYYA APPA ROW . . . . . RESPONDENT.

1879  
 Dec. 13th.

*Hindu Law—Impartible Raj, Resumption and Regrant of, by Government—  
 Divisibility—Sunnud, Construction of—"Heirs."*

In 1783, an impartible raj was confiscated by the Government on account of the rebellion of the then zemindar. In the following year it was restored to the eldest son of the former zemindar as it existed prior to the confiscation. In 1793, the estate was again resumed by the Government for arrears of revenue, and in 1872, two new zemindaries were carved out of it, one of which was granted to the second son of the zemindar who was deprived of possession in 1783, at a fixed revenue. The sunnud, by which the grant was created, contained *inter alia* the following clauses :—

"You shall be at free liberty to transfer, without the previous consent of Government or any other authority, to whomsoever you may think proper, either by gift, sale, or otherwise your proprietary right in the whole or in any part of your zemindary. \* \* \* \* \*

Continuing to perform the above stipulations, and to perform the duties of allegiance to Government, you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns, at the permanent assessment herein named."

*Held* (reversing the decision of the High Court), that the word, heirs, in the sunnud must be construed to mean the heirs of the grantees, according to the ordinary rules of inheritance of the Hindu Law, and not a single heir, according to the rule of primogeniture which formerly obtained in the zemindary.

*Baboo Beer Pertab Sahoe vs. Moharajah Rajender Pertab Sahoe*, 12 Moore's I. A., 1, distinguished.

APPEAL from a decision passed by a Divisional Bench of the Court of Madras.

*For*, Q. C., and Grady, for the Appellant.

*For*, Q. C., and Mayne, for the Respondent.

The facts are sufficiently set forth in the judgment of their Honours of the Judicial Committee (1), which was as follows :—

On an appeal from a judgment and decree of the High Court of Madras.

JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH,

•and Sir ROBERT P. COLLIER.



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APPA ROW.Judgment.

Court of Judicature at Madras, affirming a judgment and decree of the Acting District Judge of Guntur, in a suit in which the appellant was the plaintiff, and the deceased respondent, Rajah Narayya Appa Row, was one and the principal one of the defendants.

The suit was brought to recover, amongst other things, a sixth part or share of the zemindary of six pergunnahs of Nuzvid, in the Kondapalli Circar, to which the plaintiff claimed to be entitled by inheritance, as one of the six sons of Rajah Shobhanadri.

It was not disputed that the zemindary, prior to the year 1802, formed part of an ancient and much larger estate which was indivisible and descendible to a single heir, and that prior to the British rule it was a military jagheer, held on the tenure of military service, and in the nature of a raj or principality.

It is unnecessary to trace the succession to the ancient zemindary further back than to the year 1772. It is found by the Judge of the First Court, that in that year, Vankatadri, who had succeeded to the estate, died, and was succeeded by his son Narayya, who was proclaimed a rebel, and made a state prisoner in 1783. The entire estate was confiscated and resumed by Government, and in the year 1784 was restored to Venkata Narasimha, the eldest son of Narayya, the rebel. It may be assumed that the estate, which was restored in its entirety, was restored as it existed prior to the confiscation, and that the rule as to impartibility and descent continued as before.—See the *Hunsapore Case*, 12 Moore's Indian Appeals, 1.

Narayya, the rebel, had three sons Venkata Narasimha, the eldest, to whom the estate was restored, Ram Chandra and Narasimha.

In 1793, the estate was again resumed by Government for arrears of revenue, and in 1802 two new zemindaries were carved out of it, of which the zemindary of Nuzvid, now the subject of dispute, was granted to the second son, Ram Chandra, and the other, Nidadavolu, which was of much greater extent, to the eldest son, Venkata Narasimha.

Upon the death of Ram Chandra, he was succeeded by his son Shobhanadri. In 1816, the third brother, Narasimha,

brought a suit against his eldest brother, the zemindar of Nidadavolu, and against the guardian of the minor zemindar of Nuzvid, in which he claimed one-third of the whole property as being joint and divisible family property. He obtained a decree in his favor in the original Court. This was reversed on appeal by the Sudder Court, and his suit was dismissed. The ground of the decision was that the act of the Government in creating the two zemindaries was an act of State, and that the zemindars held by a title which the Courts could not question. No appeal was preferred against the decree of the Sudder Court, which became final. The unsuccessful plaintiff died some time after the decree and an arrangement was made by which the two zemindars settled an annual sum upon his family for their maintenance. This was afterwards commuted into a grant of land in full of all claims, past and future. Whatever, therefore, might have been the rights of the third brother, Narasimha, they have been extinguished.

On the 7th December 1864, the eldest of the said three brothers, the zemindar of Nidadavolu, died, leaving two childless widows and a will, in which he expressed a wish that his estates should be divided equally between his widows. The Collector, in reporting the facts to the Board of Revenue, expressed his opinion that the elder wife should be recognized as successor, and that the division of the estates should be allowed, as they were of ancient origin.

Shobhanadri, the second holder of the newly-created Nuzvid zemindary, had six sons. In 1866, his extravagance and mismanagement of the estate had caused quarrels between himself and his eldest son, Narayya, the principal defendant, and the principal first respondent, for the settlement of which the assistance of the Collector and the Government was invoked. In consequence of these disputes, Shobhanadri presented a petition to the Government in November 1866, praying that orders might be issued for the division of his estate among his sons. On the 1st January 1867, the Government replied, referring him to the Collector, to whom instructions had been communicated on the subject of his petition. What those instructions were does not appear. From what follows, however, it is evident, as stated by

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 —  
*Judgment.*  
 —

the respondents in their case, that his request for a division refused.

Shobhanadri died on the 28th October 1868, leaving six sons of whom the plaintiff was one. The eldest, Naraya was plaintiff in possession of the zemindary by the Collector, and on the 1 December 1869 was registered, under the orders of the Board of Revenue, as zemindar of Nuzvid.

On the 30th November 1868, Venkata Narasimha, the plaintiff and present appellant, petitioned Government, praying for division of the zemindary, and was informed in reply that the estate was not divisible. He repeated his application on the 2 January 1869, referring to the wish expressed by his father that the zemindary should be divided among his sons. To this petition the Government again replied that the zemindary cannot be divided, except under the provisions of Regulation XXV of 1818 or in conformity with a decree of a competent Court.

On the 20th October 1871, the plaintiff commenced his suit against the deceased respondent Narayya, as the principal defendant, and joined his four other brothers as co-defendants.

The first defendant, Narayya, put in a written statement, and contended that the disputed zemindary was an ancient zemindary and of the nature of an impartible raj. The other defendants upheld the plaintiff's right to a division of the zemindary, and stated that the plaintiff had no cause of action against them.

On the 8th July, the First Court framed, amongst others, the following issue, viz.: "Whether the real property, constituting the zemindary of Nuzvid, is divisible or not," and having found in favour of that issue against the plaintiff, dismissed his suit so far as related to the zemindary in dispute.

The High Court, upon appeal, affirmed the decision of the First Court, whereupon the plaintiff appealed to Her Majesty in Council against the judgment and decree of the High Court.

Pending the appeal, the first and principal defendant, Narayya, who was the first respondent, died, and by order of the Revivor, the Court of Wards were made respondents in his place.

This case has been fully argued on both sides, and the question to be considered is whether, when the ancient zemindary was divided into two, the newly constituted zemindary of Nuzvid

now in dispute, was subject to the same rule as regards impartibility and inheritance as that to which the entire ancient zemindary was subject.

The sunnud, under which the zemindary of Nuzvid was granted to Ram Chundra, is dated the 8th December 1802, and will be found at page 153 of the record. It is directed to Ram Chundra, describing him as the zemindar of the six pergunnaahs of Nuzvid in the Kondapalli Circar, and after reciting the benefits to be derived from a permanent settlement of the revenue, it was declared in the second paragraph (p. 154), that the Government had resolved to grant to zemindars and other landholders, and their heirs and successors, a permanent property in their lands in all time to come and to fix for ever a moderate assessment of public revenue on such lands.

By clause 4, the settlement was fixed at a certain amount. By clause 7 it was said: "You shall be at free liberty to transfer without the previous consent of Government, or of any other authority, to whomsoever you may think proper, either by sale gift, or otherwise, your proprietary right in the whole, or in any part of your zemindary; such transfers of your land shall be valid and recognized by the Courts and officers of Government, provided they shall not be repugnant to the Mahomedan or the Hindow law, or to the regulations of the British Government." And, finally, after annexing to the grant certain stipulations, the 15th Article declared that "continuing to perform the above stipulations, and to perform the duties of allegiance to Government, you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns, at the permanent assessment herein named the zemindary of ."

The name of the zemindary is not inserted, but at the end of the sunnud there was added a list headed "A list of the villages in the zemindary of the six pergunnaahs of Nuzvid, in the Kondapalli Circar."

The name of the zemindary in dispute appears, therefore, to be, in strictness, "the zemindary of the six pergunnaahs of Nuzvid, in the Kondapalli Circar," but for convenience it is treated as the zemindary of Nuzvid.

The provisions of the sunnud differed in no respect from those

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which are contained in every ordinary deed of permanent settlement; the feudal or military tenure was at an end; the six pergunnahs, to which the sunnud related, became a new zemindary subject only to the payment of a fixed land revenue, and subject to the ordinary stipulations and the performance of the duties ordinarily imposed upon zemindars.

It is stated in the 11th paragraph of the written statement of the first defendant, "that under the Empire of the Mahomedans, the ancient zemindary of Nuzvid was extensive, and was governed by its chief with absolute power and independence, but under the policy of the British Government the same has become divested of its military character, and dwindled into a large peiscush-paying zemindary."

This is doubtless a correct statement.

In the former state of things indivisibility and impartibility and descent to a single heir were the ancient nature of the tenure, and with good reason when the estate was subject to military services, and under the government of a chieftain and was in the nature of a raj or principality, but when the ancient zemindary was resumed, and two new estates were created out of it, of which the zemindars ceased to be liable to military service or to be independent chiefs, but held more as ordinary zemindars, subject to the payment of a fixed assessment of revenue, there was no reason why the rule of impartibility or descendibility to a single heir, according to the rule of primogeniture, should be extended to the newly-created estates.

There was no state policy which required that the new estate of Nuzvid should be indivisible, otherwise clause 7 would not have been inserted in the sunnud. If Ram Chundra had transferred by gift, sale, or otherwise, any portion of his zemindary, such portion would not have been impartible or descendible, according to the rule of primogeniture, to a single heir of the transferee, if a Hindoo or Mahomedan. Indeed it was expressly stipulated in the sunnud, that transfers in whole or in part should be valid, provided they should not be repugnant to the Hindoo or Mahomedan laws, which they would have been if they had been limited to the eldest son or other single heir of a Hindoo

or Mahomedan transferee. There was no reason why the new zemindary should have been made impartible or limited to Rajah Ram Chundra and his heirs according to the rule of primogeniture, when, so far as Government was concerned, he might have divided it by will amongst several devisees.

The limitation in paragraph 15 of the sunnud was to his heirs, by which, according to their Lordship's interpretation, his heirs, according to the ordinary rule of Hindoo law, were intended. Ram Chundra did not, at the date of the sunnud, hold an estate descendible to a single heir according to the rule of primogeniture, and there is no reason why the limitation of his heirs should be construed to mean a single heir according to the rule of primogeniture, when the descent from his transferees would be regulated by the ordinary rules of inheritance. If the Government had intended to make the estate impartible, and to limit the succession to a single heir according to the rule of primogeniture, instead of to the heirs of the grantee, according to the rule of Hindoo law, there is no doubt they would have expressed their intention in unambiguous language. Their Lordships have nothing to do with the case of Venkata's new zemindary of Nidadavolu, and therefore abstain from any expression of opinion as to whether it was impartible or descendible to a single heir or not. Nor are they, nor were the Civil Courts, bound by any views of the revenue authorities as to the effect or construction of the grant or the intention of the Government. Nor has the decision of the Sudder Court, in Narasimha's case any bearing upon the construction of the sunnud of 1802, or upon the rights of the parties to the suit. In the Hunsapore case (12 Moore's Indian Appeals, 1), the zemindary was an impartible raj, which, by family usage and custom, descended to the eldest male heir, according to the rule of primogeniture, subject to the obligation of making babooana allowances to the junior members of the family for maintenance. It was seized and confiscated by the British Government in 1767, in consequence of the rebellion of the Rajah, who was expelled by force of arms. The Government, having kept possession until 1790, granted it in that year to a younger member of the family, on whom subsequently they conferred the title of Rajah. There was no

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fresh sunnud, and the only question raised was—what was the nature of the estate granted; whether it was a fresh grant of the family raj, with its customary rule of descent, or merely a grant of the lands formerly included in the raj, to be held as an ordinary zemindary. In that case, the estate, whilst in the hands of the Government, had never been broken up, and it was held that it was the intention of the Government to restore the zemindary as it existed before the confiscation; and that the transaction was not so much the creation of a new tenure as the change of the tenant by the exercise of a *vis major*. There the estate was transferred in its entirety, but in this case the estate was divided into two distinct zemindaries, and a new sunnud granted, allowing the same to be alienated in part or in whole, and making it inheritable by a person and his heirs and assigns for ever, that person being one who had never held an estate descendible to his eldest male heir.

The word heirs used in the sunnud must, in their Lordships' opinion, be construed to mean the heirs of the grantee, according to the ordinary rules of inheritance of the Hindoo law.

With reference to the effect of the sunnud of 1802, some reliance was attempted to be placed on an agreement said to have been entered into between Venkata Narasimha and his brother Rajah Ram Chundra, dated 17th July 1795, but their Lordships do not think that it was legally proved, and therefore reject it. In considering the effect of the sunnud of the 8th December 1802, reference may be had to the letter of Mr. John Read, the Collector of Masulipatam, to the Secretary of the Land Revenue Settlement Division, dated 25th July 1802, in which he submitted a plan for the division of the ancient zemindary of Nuzvid, and offered an opinion as to the respective claims of Venkata Narasimha, and of Ram Chundra, preparatory to the introduction of the permanent settlement (Record, p. 169.) In that letter, of which their Lordships are of opinion that the official copy of the copy filed with the Board of Revenue (which was an official record), was under the circumstances admissible in evidence. Mr. Read says:—

“A perusal of the late Collector's correspondence will show that Ram Chundra Row's claim to participate in the zemindary

has been long and steadily maintained, so late indeed as the 17th July 1795. The views of Venkata Narasimha Appa Row, and Ram Chundra Row, underwent the discussion of their relatives and adherents. In consequence, an agreement was exchanged, providing for the division of the estate, effects and zemindary of their deceased father, conformable to the usage in such cases.

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"No doubt remains of the execution of this agreement, although I cannot find it received the sanction of the Collector. The elder Appa Row pretends to state that the document was forcibly taken, and has presented what he terms a correct plan for the division of the zemindary. The charge of forcible exchange, I believe to be incorrect, and the agreement, to which Venkata Narasimha Appa Row appeals, is on more than a loose memorandum in the handwriting of the Rajahmundry Peishkar."

But even without that letter their Lordships have no doubt whatever as to the proper construction of the sunnud of 1802, and that the zemindary thereby created for the first time was not impartible or descendible, otherwise than according to the ordinary rule of the Hindu law.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the judgment and decrees of both the lower Courts, and to order that the appellant do recover one-sixth part or share of the villages included in the zemindary in six pergunnahs of Nuzvid in the Kondapalli Circar, together with his costs in both the lower Courts, in proportion to the value of that property.

It is found by the First Court that the Kamatan lands and gardens in various villages, to a total value of Rs. 58,500, of which a garden, value of Rs. 300, is in the plaintiff's possession, and also the forts, houses, granaries, stables, &c., valued at Rs. 1,23,500, form part of the zemindary, and were, therefore, indivisible under the first issue, and no appeal was preferred against that finding.

Their Lordships will, therefore, further humbly advise Her Majesty that the said Kamatan lands and gardens, forts, houses, granaries, stables, &c., abovementioned, be declared to be part of the zemindary above-mentioned, and that the appellant is entitled to recover one-sixth part or share thereof, with the exception of the said garden, valued at Rs. 300, in the plaintiff's possession.



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Their Lordships will further recommend to Her Majesty that the amount of mesne profits, from the date of dispossession of the share of the property ordered to be recovered, to the date of restoration thereof, be assessed in execution.

The costs of this appeal must be paid out of the estate of Rajah Narayya Appa Row, deceased, the original defendant and respondent.

## [PRIVY COUNCIL.]

1880  
March 18th.

NARAYANRAO RAM CHANDRA PANT . . DEFENDANT;

AND

RAMABAI . . . . . PLAINTIFF.

*Limitation—Act XIV of 1859, section 1, sub-section 13—Maintenance.*

A testator, who died in 1855, bequeathed all his property to his eldest son by his will, which contained the following provision: "He (the eldest son) shall provide for both mothers, treating them with great respect, and he shall regard each of his two younger brothers as a son, providing for them, and my own servants in a manner befitting their several conditions in life." In 1871 one of his widows brought an action for maintenance and arrears of maintenance.

*Held*, that the maintenance was not made a charge upon the estate, and that consequently the suit was not barred under Act XIV of 1859, section 1, sub-section 13.

By common law the right to maintenance is a right accruing from time to time according to the wants and exigencies of the person entitled to claim it.

**A**PPEAL from a decision passed by the High Court at Bombay:

*Benjamin, Q.C.*, and *Myburgh*, for the Appellant.

The Respondent did not appear.

The judgment of their Lordships of the Judicial Committee (1) was as follows:—

This was a suit brought by Ramabai, the widow of Ram Chandra Pant, against Narayanrao Ram Chandra Pant, &

(1) Sir JAMES W. COLVILLE, Sir MONTAGUE E. SMITH, and Sir EDWARD P. COLLIER.

eldest son, to recover arrears of maintenance. The claim states: "The liability to maintain me according to the dignity of my family rests under the Hindu law with the defendant." Ram Chandra Pant was Subadar, in the service of the Maharajah, the Ex-Peishwa. He died on the 22nd July 1855, leaving two wives and children by each. The defendant was the stepson of the widow Ramabai, the plaintiff. A great deal of litigation has taken place in this family owing to disputes which arose immediately after Ram Chandra Pant's death. He left a will which was disputed by his younger sons, and an action was brought, which ultimately came upon appeal to Her Majesty in Council. After considerable discussion of the evidence which had been given at great length, the will was established. Another suit was brought by the widows to recover some jewels which they alleged to be their property under the will of the testator, in which the widows failed, it being decided that the jewels, to which they might lay claim under the will, were in their own possession. This antecedent litigation does not materially affect the question arising in the present suit, except so far as it shows the state of hostility in the family, and accounts for the withholding by the defendant of the maintenance to which the plaintiff was entitled. The present suit was brought on the 18th October 1871.

One point now raised is that the maintenance is barred by limitation; the other point is that the maintenance is payable under the will of Ram Chandra Pant, and that it is a condition precedent to the right to obtain it that the widow should live under the same roof in joint family with the defendant. Those are the two principal points which have been raised. A third point is that there has been no demand and refusal of the maintenance.

The case has been tried in the Courts below upon several issues, which it is not necessary to mention in detail, inasmuch, as the three points just indicated are those which alone are relied upon at the bar. The result of the suit in the Courts in India was, that the Subordinate Judge awarded a sum of Rs. 300 per mensem to the plaintiff for maintenance, and gave her arrears for six years amounting to Rs. 21,000. The High Court reduced the monthly allowance to Rs. 200, and proportionately reduced the amount of arrears, giving the sum of Rs. 14,400.

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RAM CHAN-  
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 DRA PANT  
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 —  
*Judgment.*  
 —

To comprehend the argument on the points which alone remain for decision, it is necessary to refer to the will of Ram Chandra Pant. It is stated in the report of the appeal of Her Majesty in the 9th Moore's Indian Appeals, page 101. Mr. Benjamin read the will from this report. It is thus stated:—"The effect of it, according to the English translation, as made in the Zillah Court, was to declare that the testator was seventy-five years of age; that his eldest son had two sons and one daughter, and that his younger sons were childless. It then proceeded to express his hopes that his wives and his sons would all live amicably together, and that all would look upon and consider his eldest son as the head of his family after his death. He then bequeathed the whole of his property, real and personal, to his eldest son, directing him to provide for both his wives, and to pay them proper respect, and to provide also for his younger brothers and for the testator's dependants; and he declared that he had made these provisions with a view to prevent dissensions in the family, and to enable them to live in peace and harmony after his decease. If, however, the younger sons should not feel disposed to abide by these directions, and should insist on a separation from the family, then the eldest son was to receive the rents of two villages mentioned in the will, and pay over the proceeds to his younger brothers, as such proceeds were from time to time received, and he was further to pay to each the sum of Rs. 25,000. The testator then gave Rs. 13,000 for the benefit of his grand-daughter, the daughter of the appellant, on her marriage, and allotted Rs. 40,000 for what he calls the customary outlay in the first year after his death, including religious pilgrimages." The words of the will relating to the points in issue, according to one of the translations in the present record, to which the attention was called by the learned counsel during the argument, were: "Nana, the eldest son, shall provide for both the mothers, treating them with great respect; and he shall regard each of his two younger brothers as a son, providing for them, and my old servants, in a manner befitting their several conditions of life."

The testator's property appears to have been self-acquired, and

consisted of some villages and large sums of money in Government paper, and other personal property, and he refers in his will to an expected pension from the East India Company. It has been conceded at the bar that whatever was given by the testator to his wives in his lifetime was not given in lieu of maintenance; in fact, all that was given to them were some jewels, no doubt, of considerable value. Nor has any question been made at the bar that if the plaintiff is entitled to succeed, the amount awarded by the High Court is excessive. The only questions are those which have been already mentioned.

The first question arises upon the Statute of Limitations, and that it is contended that this is barred altogether, both for the maintenance and the arrears, by sub-section 13 of the 1st section of Act XIV of 1859, which is in these terms: "To suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property; and to suits for the recovery of maintenance where the right to receive such maintenance is a charge on the inheritance of any estate; the period of twelve years from the death of the persons from whom the property, alleged to be joint, is said to have descended, or on whose estate the maintenance is alleged to be a charge." It was contended that under the will of the testator the maintenance is made by the will a charge upon the estate. The effect of the will is, no doubt, to give the whole property of the deceased to the eldest son, mainly because he appears to have had more confidence in his eldest son than in the younger ones. But whilst giving the estate to the eldest son he recognises the claims by Hindoo law of the younger brothers and the widows to maintenance. He makes specific provisions with regard to the younger brothers, giving them the profits of particular villages, but he makes no specific arrangement for the widows. He merely requires that they should be maintained and treated with proper respect. He creates no charge on any specific portion of his property, but imposes an obligation upon the defendant to make allowances for the support of the widows, of a kind analogous to the maintenance to which widows, by common law, are entitled, supposing probably that by his will he might have interfered with that law. It is to be observed

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that in the former suit brought by the widows they claimed under the will, and to take the benefit of it.

Assuming this to be the proper construction of the will, their Lordships think that the Subordinate Judge was right in his conclusion that he did not create a right which was a specific "charge on the inheritance of any estate" within the meaning of those words in the 13th sub-section of the Statute.

The language of the Act is not very clear, and by two subsequent Statutes of Limitation, the events from which the time of limitation is to run in the case of maintenance are wholly different. By common law the right to maintenance is one accruing from time to time according to the wants and exigencies of the widow; and the Statute of Limitation might do much harm if it should force widows to claim their strict rights, and commence litigation which, but for the purpose of keeping alive their claim, would not be necessary or desirable.

The only authority cited by the Subordinate Judge is the case of *Timmappa Bhat vs. Parmeshriamma*, 5 Bom. H. C. R., 130, which sustains his judgment, though the facts are not altogether the same as the facts of the case now under appeal. No decision was cited at the bar opposed to the construction which the Subordinate Judge has put upon the Act.

Their Lordships have observed with some surprise that no mention of this point, which is undoubtedly one of some importance, was made in the judgment of the High Court, and they think that when an appellant comes to complain of the judgment of a Court upon a point which does not appear upon their judgment, it would be proper, and at least convenient, that some explanation should be given why the point does not so appear. It may be that this point was disposed of in the course of the argument. In the absence of explanation the High Court must be taken to have agreed with the Subordinate Judge.

The second point made was that the plaintiff has disentitled herself to maintenance by separating from the son and living apart from him. It is argued that it was made a condition of the will, to entitle her to maintenance, that she should reside under the same roof and in joint family with him. Their Lordships, however, think that no such condition is to be found in the

will, and that she was to be left in this respect in the ordinary position of a Hindoo widow, in which case separation from the ancestral house would not generally disentitle her to maintenance suitable to her rank and condition.

It was then said that no action could be maintained, because a demand and refusal had been proved. There is no evidence that a specific demand was made for the maintenance, but the Subordinate Judge has found, and the High Court have not disagreed with him, that the maintenance was refused; and taking all the circumstances of his family into consideration, their Lordships do not doubt that there was a withholding of this maintenance by the son under circumstances which would amount to a refusal of it.

These observations dispose of all the points which have been raised at the bar, and their Lordships think that this appeal fails, and they will humbly advise Her Majesty to affirm the decree of the Court below.

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## [ORIGINAL CIVIL JURISDICTION.]

P. A. PEPIN . . . . .  
AND  
CHUNDER SEEKHUR MOOKERJEE AND  
ANOTHER . . . . .

April 1st.

*Assignment of Lease—Liability of ultimate Assignee to indemnify a mesne Assignee against breach of Covenant—Indemnity, Contract of—Limitation Act (XV of 1877) Schedule II., Art. 83—Damages—Costs of Litigation.*

In 1864, under a lease containing a covenant to repair thoroughly every fourth year, A leased certain premises to B for a term of ten years. B died during the term, and his estate was administered by the Administrator-General who, after repairing the premises, assigned the lease to L & Co., of which firm the plaintiff was a member. The lease having subsequently become vested in the plaintiff alone, he, on the 3rd February 1872, assigned it to the defendants, the assignment being expressed to be under and subject to the conditions and covenants of the lease. The defendants failed to make the repairs in 1872 required in terms of the lease, and the lease expired without such repairs being effected.

The original lessor having died, his representative C, brought two suits against the defendants for damages for breach of the covenant to repair, and for arrears of rent, and obtained decrees for Rs. 6,000 for

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damages, and Rs. 1,917-3 for arrears and costs. Under these decrees certain property of the defendant was attached, but satisfaction not having been obtained, C sued the Administrator-General, and obtained a decree for Rs. 8,328-3 including costs. The Administrator-General having paid that sum to C on 15th April 1876, thereupon sued the plaintiffs for Rs. 10,110-15, which included the amount of the decree obtained against him with costs, and his own costs of defence.

On the 8th April 1877 the defendants compromised the claims of C under the two decrees against them by the payment of Rs. 5,500.

The suit of the Administrator-General was subsequently compromised also, the plaintiff who was then defendant agreeing to a decree for Rs. 6,932-12-11, and costs which amounted to Rs. 997-7-6.

Thereupon the present suit was brought to recover from the defendants the sum recovered by the Administrator-General, together with his own costs of defence which amounted to Rs. 1,028-9.

*Held*, on the authority of *Moule vs. Garret*, L. R., 7 Exch. 101, that in the absence of an express covenant there was an implied obligation on the part of the defendants to indemnify the plaintiffs in respect of the covenants of the lease; and that the defendants were liable not only for the amount of the decree and costs obtained by the Administrator-General, but also for the costs incurred by the plaintiff in defending the suit brought by the Administrator-General against him.

*Bazendale vs. London, Chatham, and Dover Ry. Co.*, L. R. 10, Exch. 35; and *Fisher vs. The Val de Travers Asphalt Co.*, L. R. 1 C. P. D., 511, distinguished.

[Compare Indian Contract Act, section 145, illustration (a)—Ed.]

*Held*, further, that as under Art. 83 of the Limitation Act, XV of 1877, limitation in the case of a contract of indemnity runs from the time when the plaintiff is actually damnified, limitation, in this case, must be taken to have run from the time when the Administrator recovered against him, and that the suit was not barred.

**I**N this case the plaintiff sought to recover from the defendants the sum of Rs. 7,832-4, which was paid to the Administrator-General of Bengal by the plaintiff in settlement of suit No. 401 of 1877, brought by the former against the latter, and also for Rs. 1,027-9 for costs incurred by the latter in defending such suit with interest.

The facts, as stated in the plaint, and admitted in the written statement, or proved at the hearing, are as follows :—

In June 1864, one Kissen Kissors Ghose granted to one Archib a lease of premises No. 125, Bow Bazar, for a term of ten years

at a rent reserved. The lease contained a covenant to repair thoroughly in every fourth year during the term. Archer died, and the Administrator-General administered his estate. The Administrator-General, having repaired the premises, assigned them to the firm of Lepage and Co., of which firm the plaintiff was a member, and the lease subsequently became vested in the plaintiff alone. On the 3rd February 1872, the plaintiff assigned the lease, together with the business of Lepage and Co. to the defendants, in the name of the defendant Poorno Chunder alone. The assignment was expressed to be under, and subject to the conditions and covenants of the lease.

When the fourth year for making repairs came, the defendants failed to make any, and the term expired with the premises unrepaired.

The original lessor being dead, his widow and representative, Burnomoye Dossee, brought a suit against the defendant Poorno Chunder in this Court. In this suit she claimed arrears of rent and rates and damages, for breach of covenant to repair. On the 2nd of February 1875 a decree was made in that suit which showed that the rent and rates had been paid after suit brought, and awarded Rs. 6,000 as damages for non-repair with costs. The same person brought a second suit against the same defendant. In this suit she claimed possession of the premises and arrears of rent and rates, and mesne profits. The decree in this suit, dated the 7th of April 1875, shows that after suit possession had been given, and awards Rs. 1,917-3 in respect of arrears with costs.

Under these two decrees Burnomoye attached certain property of the defendant Poorno Chunder, but failed, at that time, to obtain any satisfaction.

Burnomoye then brought a suit against the Administrator-General as Administrator of Archer, in which she claimed Rs. 1,167-3 for arrears of rent and rates, and Rs. 6,000 as damages for non-repair. The Administrator-General defended the suit, and a decree was made for Rs. 6,167-3, with costs. The Administrator-General had also his own costs to bear. The decree and the plaintiff's costs amounted to Rs. 8,328-3. The Administrator-General's own costs amounted to Rs. 1,491-1.

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On the 13th of September 1876, the Administrator-General paid to Burnomoye the Rs. 8,328-3, the amount of her decree and costs. In the meantime the property of the defendant, Poorno Chunder, remained under Burnomoye's attachment. The first decree against that defendant was for Rs. 6,000. The taxed costs of Burnomoye in that suit, including those of an unsuccessful appeal, were Rs. 3,261. The second decree was for Rs. 1,917-3, and the taxed costs of Burnomoye amounted to Rs. 491. Early in April 1877, the representatives of Burnomoye and of the defendant Poorno Chunder met at the office of Burnomoye's attorney. The accounts in respect of the two decrees were gone into, and soon after, on the 8th of April, Poorno Chunder paid to Burnomoye Rs. 5,500, which was accepted in full satisfaction of the two decrees, and the attachment was withdrawn. This Rs. 5,500, it must be observed, was considerably less than the difference between the sum paid as damages by the Administrator-General and the sums due to Burnomoye under the two decrees for debt and costs, and that without any allowance for interest to which she was entitled.

In 1877 the Administrator-General brought a suit against the present plaintiff to recover from him the amount which he had been compelled to pay to Burnomoye. He claimed Rs. 10,110-13, which included the amount of the decree against him, with Burnomoye's taxed costs and his own costs of defence. The present plaintiff gave notice of this suit to the present defendants, and called upon them to intervene and defend if they desired to do so. They made no reply.

The present plaintiff filed his written statement in that suit, but subsequently consented to a decree for Rs. 6,932-12-11 with costs. The costs amounted to Rs. 997-7-6, and the plaintiff has paid, or is liable to pay, the whole.

Thereupon the present suit was brought to recover from the defendants the sum recovered from him by the Administrator-General, together with his own costs of defence amounting to Rs. 1,028-9.

*Jackson, Bonnerjee and Trevelyan, for the Plaintiffs.*

*Kennedy and Allen, for the Defendants.*

*Bonnerjee*.—At the settlement of issues on the authority of *Moule vs. Garrett*, L. R. 7 Ex., 101 it was held by Mr. Justice PONTIFEX that the plaintiffs disclosed a good cause of action.

In that case it was decided that the assignee of a lease by mesne assignments is under an obligation to indemnify the original lessee against breaches of covenants in the lease, committed during the continuance of his own tenancy, and that that obligation is not affected by the covenants which the assignee may have made with his immediate assignor.

The *onus*, in the present case, is upon the defendants to show that either of them has absolved himself to any extent from liability to the plaintiff by payments to the original lessors.

*Kennedy*.—The precise question in this case has never been decided. In the case of *Moule vs. Garrett*, L. R. 7 Exch., 101, it was decided that when the assignment contains no covenant to indemnify, there is an implied covenant on the part of the ultimate assignee of the lease to indemnify the original assignor.

In *Burnett vs. Lynch*, 5 B. and C., 589, the lessee by deed poll assigned his interest in the demised premises subject to the payment of rent and the performance of the covenants contained in the lease. The assignee took possession and occupied the premises under the assignment, and before the expiration of the term assigned to a third person. Although there was no express covenant or contract by the first assignee to pay the rent or perform the covenants, he was held liable for damages recovered by the lessor against the lessee for having suffered the premises to get out of repair. ABBOTT, C. J., said :—"If we should hold that no action will lie, this consequence will follow that a man having taken an estate from another, subject to the payment of rent and the performance of covenants, and having thereby induced an understanding in the other that he would pay the rent and perform the covenants, will be allowed to put that burden on the other person."

The principle upon which that case was decided is, that the law implies a promise, or cast a duty upon the assignee to perform covenants and pay the rent. The implied duty is merely to perform the covenants and pay the rent, and not to indemnify the

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assignor; and, if the assignee himself again assign over to a third person, the obligation so far as he is concerned ceases. In the present case the obligation was upon us only so long as we were in possession.

The cause of action arose the instant the covenants were broken—*Moule vs. Garrett*, L. R. 7 Ex., 101, and, therefore, the suit is barred.

[WILSON, J.—If this suit had been brought in England under the old law might it not have lain as for money paid?]

The money which the plaintiff has paid was not money which he was compellable by law to pay. In *Sanders and Benson*, 4 Beav., 352, this point was expressly decided.

[WILSON, J.—That is not a case between assignor and assignee.]

Here the entire amount of the decree against the Administrator-General was Rs. 6,000. Now we are asked to pay Rs. 9,832. That amount is certainly not recoverable from us. The modern authorities are clear that if a person who is responsible chooses not to submit to his responsibility, but contests the claim made against him, he cannot be allowed by so doing to add to the liability of those who are securities for him. *Baxendale vs. London Chatham and Dover Railway Co.*, L. R. 10 Ex., 35.

[WILSON, J.—That case was decided on the ground that there was no contract of indemnity.]

We are not bound to indemnify them in respect of costs incurred for wrongfully defending a suit. Our position would have been exactly the same if we had not been assignees, but sub-lessees with formal covenants—*Fisher vs. Val de Travers Co.*, L. R. 1. C. P. D., 511.

*Trevelyan*, in reply, referred, as to costs, to *Howard vs. Lovegrove*, L. R. 6 Ex., 43. He contended that the cause of action arose only from the time the plaintiff was damnified, that is from the time when the Administrator-General recovered against him.

The following judgment was delivered by

WILSON, J. :—

This is a suit by the assignor against the assignees of a lease,

in which the plaintiff seeks to be indemnified in respect of money which he has been compelled to pay by reason of the defendants' failure to perform the covenants in the lease.

[The learned Judge here stated the facts, and then continued as follows :—]

The case came before PONTIFEX J., for settlement of issues. That learned Judge held, that the plaint disclosed a good cause of action, on the authority of *Moule vs. Garrett*, L. R., 7 Exch. 101; and the following issues were settled :—

1st—Does Limitation apply ?

2nd—Have the defendants, or either of them, by any and what payments to the original lessors, absolved themselves or himself to any and what extent from liability to the plaintiff ?

3rd—Are the defendants, or either of them, liable to any and what damages ?

These issues came on for trial on the 23rd and 24th of March.

As to the first issue, that as to limitation, the defendants' case was put thus :—

It was said the implied obligation of the assignee of a lease is to perform the covenants of the lease; on the failure to perform such covenants by the assignee, a right of action accrues to the assignor; and, therefore, limitation runs from that date. For this *Burnett vs. Lynch*, 5 B. and C., 589, was cited.

I do not think *Burnett vs. Lynch* is an authority for such a proposition. What was decided is thus stated by BAYLEY, J. :—

"An action upon the case founded upon the tort will lie on this ground, that from the facts stated in this declaration the law raises a duty in the defendant to perform the covenants, that there has been a breach of that duty, and that damage has accrued to the plaintiffs in consequence of that breach of duty."

But even were the obligation such as that contended for, it does not follow that no other obligation lies upon the assignee.

An assignment of a lease commonly contains a covenant by the assignee to pay the rent and perform the covenants, and also a covenant to indemnify the assignor. *Moule vs. Garrett* is, in my judgment, a clear authority to the effect, that in the absence of express covenant such an obligation to indemnify is to be implied.

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Then by article 83 of the 1st Division of the 2nd Schedule of the Limitation Act (XV of 1877), limitation, in the case of a contract of indemnity, runs from the date when the plaintiff is actually damaged. In the present case, therefore, limitation began to run when the Administrator-General recovered against the plaintiff, and the suit is not barred.

With regard to the second issue, the defendants have failed to show any defence under it. The first defendant has never paid any thing to the original lessor. The second defendant has paid Rs. 5,500. But he paid it after the Administrator-General had paid the amount of the decree against him; and from the amount for which that defendant settled the claims against him, it is plain that he was allowed the benefit of the Administrator-General's payment.

As to the third issue, it was contended for the defendants, that the plaintiff cannot recover the whole of his claim. It was pointed out that the Administrator-General claimed against the present plaintiff not only the damages recovered against him, but also the costs he had to pay to Burnomoye, and his own costs of defence; and that the present plaintiff has further added to this claim the costs he had to pay the Administrator-General and his own costs of defence. These costs, it was contended, cannot be recovered. And for this were cited *Baxendale vs. London Chatham and Dover Railway Company*, L. R., 10 Exch. 35; and *Fisher vs. The Val de Travers Asphalte Company*, L. R., 1 C. P. D. 511. In *Baxendale vs. London Chatham and Dover Railway Company*, the plaintiffs contracted with Harding to carry pictures from London to Paris. They afterwards contracted with the defendants that the latter should carry the pictures. By the defendants' negligence the pictures were damaged. Harding sued the plaintiffs, who defended the action, and had to pay the value of the pictures and Harding's costs; they also incurred costs in defending. The plaintiffs then sued the defendants and claimed to recover the value of the pictures, and also the costs paid and incurred. The defendants accepted the assessment of value in the former suit by paying the amount into Court, but denied their liability for costs. The Exchequer Chamber decided in favor of the defendants, on the ground that, the two

contracts being separate and independent, costs incurred in defending an action upon the one were not the natural and proximate result of a breach of the other. That case seems to me, I must say, a very plain case. To have allowed the costs would have been to take into consideration a matter (the other contract) not necessarily or naturally connected with the contract in question or its breach, and not in the contemplation of the parties at the time of contracting. This case was followed, as to costs in *Fisher vs. Val de Travers Asphalte Company*, L. R., 1 C. P. D. 511.

The distinction between such cases and the present is clearly pointed out by QUAIN, J., in *Baxendale vs. London Chatham and Dover Railway Company*, at p. 44:—

"If this were a contract of indemnity, where, although there may be two contracts in form, there is only one in substance, our decision might be in favor of the plaintiffs. In such a case, a surety, who is called upon to pay the debt due, or duty owing, from the principal, may well be justified in defending an action at the principal's expense."

In the case of a contract of indemnity the liability of the party indemnified to a third person is not only contemplated at the time of the indemnity, but is the very moving cause of that contract. And in cases of such a nature there is a series of authorities to the effect that costs reasonably incurred in resisting, or satisfying, or ascertaining the claim, may be recovered.

Thus where one person has warranted to another that he had authority to make a contract on behalf of a third person, and on the faith of the warranty, legal proceedings are taken to enforce the contract against such third persons, and it turns out that the warrantor had no such authority, the costs are recoverable against him—*Collen vs. Wright*, 7 E. and B., 301; 8 E. and B., 647; *Quinn vs. Francis*, L. R., 5 C. P., 295.

In cases of indemnity it has been so held in many cases:—*Duffield vs. Scott*, 3 Term Reports, 374; *Penley vs. Watts*, M. and W. 601, per PARKE, B., at p. 609; *Smith vs. Compton*, M. and Ad., 407; *Howard vs. Lovegrove*, L. R., 6 Exch. 43.

In the present case, I think the costs incurred by the Administrative General in the suit by Burnomoye, and those incurred by

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the present plaintiff in the suit by the Administrator-General against him, were reasonably and properly incurred. I, therefore, find as to the third issue, that the plaintiff is entitled to recover from the defendants the sum of Rs. 6,932-12-11, the sum of Rs. 997-7-6, and the sum of Rs. 1,028-9-0, with costs on scale No. 2.

[CIVIL APPELLATE JURISDICTION.]

*Jan'y. 28/81.*  
Nos. 260 and 272 of 1878  
ANNODA SUNDARI DABI . . . . . APPELLANT ;  
AND  
JUGUTMONI DABI . . . . . RESPONDENT.

*Will—Probate—Procedure—Succession Act (X of 1865), section 261.*

In cases where a will is contested, the Court is bound to consider, not only whether the alleged will was executed by the testator, but whether the will is valid or invalid, and whether probate of the will ought to be granted. Every consideration which ought to induce the Court to refuse probate of the will must be taken into account.

*Saroda Soondari Dossia vs. Muddun Mohun Shaha, 24 W. R., 162 cited.*

**A**PPEALS from an order passed by the District Judge of Dacca, refusing a certificate under Act XL of 1858 and granting probate of a will said to have been executed by one Grish Chunder Chatterji.

By the provisions of the will, Grish Chunder Chatterji, who died leaving no issue, devised all his property to his mother, then to his sister, and after her to his sister-in-law, and then to his wife Annoda Sundari only in the event of her surviving all these persons. He, however, granted to her maintenance if she continued to remain with her mother-in-law.

In February 1878, almost immediately after her husband's death, Annoda Suudari applied for a certificate under Act XL of 1858, to represent his estate. In the following April, Jugutmoni Dabi, the mother of Grish Chunder Chatterjee, set up a will of that of her deceased son, and asked for probate of the same.

The District Judge refused the certificate asked for by Annoda Sundari, but admitted the will to probate.

Annoda Sundari thereupon appealed against the orders made in both proceedings.

*H. Bell, Baboo Sreenath Banerjee, Baboo Doorga Mohun Doss,*  
and *Baboo Boycantnath Dass*, for the Appellant.

*Baboo Kashi Chant Sen*, for the Respondent.

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—  
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The following judgments were delivered by the Court (1) :—

JACKSON, J. :—

The Judge has admitted to probate the will set up by Jugutmoni Dabi as the will of her deceased son Grish Chunder Chatopadhyaya, and at the outset of the judgment, which he has delivered, the Judge states what he considers his functions to be in dealing with a case of this description. He says :—" I think that in an application for probate, the only question I have to consider is, did the testator execute the will, he being then in a fit state of mind to execute the will, and being of a mind to execute the will propounded, I do not think that I ought to consider whether the will is valid or invalid. It is sufficient for probate that the will was the deliberate intelligent act of the testator. I am not to enquire whether that Act was procured to be done by undue influence, or was void as *ultra vires*." I have had occasion to observe, in one or two previous instances, on what appeared to me an imperfect conception by the same Judge of his duty in cases under the Indian Succession Act as applying to Hindu wills. What the Judge has to consider in these cases appears to me to be whether probate of the will, propounded before him, ought to be granted, and there is no way in which a finding, under the provisions of the Indian Succession Act, on that particular question, can be disturbed, except in appeal under the Act. Section 261 directs that in any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who may have appeared, as aforesaid, to oppose the will shall be the defendant, and in that way it appears to me

• (1) JACKSON and TOTTENHAM, J.J.



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that every consideration which ought to induce the Court to refuse probate of such a will must be taken into account.

I think, therefore, that if it appeared to the Judge that such a will had been obtained by undue influence, that was clearly a consideration which should have induced him to refuse probate.

In this case, however, the question of undue influence really does not arise. The question which we have to consider simply is, whether the deceased Grish Chunder did or did not really execute the will. It purports to have been signed by Grish Chunder on the day before his death. It is written out by the witness Guru Churn Samadar, and it bears his signature and of seven subscribing witnesses, of whom two have been called. The effect of the will is to deprive the wife of the testator of her rights as heir according to Hindu Law, and postpone her succession : firstly, to the mother of the testator ; secondly, to a sister ; and thirdly, to the wife of the testator's brother. It recites, notwithstanding, a permission to adopt being granted to the wife ; that such power is to be exercised by her subject to the sanction and direction of the mother and the sister, and it further declares that the wife and the brother's wife shall not be entitled to maintenance or to enjoy the property unless they live a chaste life in the testator's, at Gaudia. These provisions being all of somewhat singular nature, apart from their being contradictory, the motive is naturally to be looked for, and the reason for the testator's so disposing of the property is said to be this,—that in his lifetime his wife, being then about 19 years of age, one day left her husband's house in company with a servant named Felu ; she was brought back the same day, but not re-admitted to conjugal intercourse, and consequently it is said the husband would not admit her to the rights of a wife and heir. Now, as to the execution of this instrument, it appears to me that the evidence given on the part of the plaintiff is very scanty and unsatisfactory. A case, very similar to the present, came before us some time ago, and the judgment which I delivered in that case—*Saroda Soonduri Dossia vs. Muddun Mohun Shaha*—is at page 162, 24 W. R. ; I fully adhere to the observations which I made on that occasion.

It seems to me to be the duty of the person propounding an

inofficious will like the present to put the Court which has to admit the will to probate very fully in possession of all the circumstances.

I have already said that only two of the seven subscribing witnesses have been called. Of seven, two, Hur Chunder Chattopadhyaya and Mohessur Gangolee, are persons of the same caste, that is to say, Koolin Brahmins, not improbably relatives of the testator.

Neither of them has been called. Two others are persons apparently of a respectable class in life, Chundi Churn Dey and Gura Nath Guho. Neither of them has been called, nor has any explanation been given for the omission to call these persons. The seventh or last witness to the deed is a Mahomedan, and I think it might be fairly stated that his evidence was not likely to be very valuable in the case, and I, therefore, make no remark as regards the omission to call him. Of the two subscribing witnesses who have been called, it appears to me that the deposition of neither is of a character such as to satisfy the Court.

Their account of the matter is naked and curt. From what they say it appears that this will had been written out more than once. There appears to have been a draft in the handwriting of another witness who has not been called, nor has that draft been produced. We have no account, whatever, from these witnesses of what took place before or about the time of the execution, except the naked fact that the testator is said to have signed in their presence. No doubt we have the evidence of a person who would unquestionably be well informed, and who, if he could be thoroughly depended upon, would be an important witness, I mean the witness Guru Churn Samadar. He is the person in whose handwriting the will is said to be, and no doubt. But I am bound to say that on comparing his evidence with that of the young wife of the testator, it appears to me that the evidence of the wife is greatly to be preferred. He does not hesitate to impute the grossest misconduct to the wife, but he himself is under an imputation of improper conduct with the testator, and it certainly appears to me that there is at least as much ground for that imputation as there is for

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that which makes against the testator's wife. On the other hand, we have a senior member of the testator's family, an advanced in years, called as a witness for the wife, and he speaks unequivocally to her good character, and that the character was really good appears to me to be vouched for by the circumstance that in the first the husband left to her power to raise a son; and that, secondly, she was permitted, in the presence of all the family, to perform the *Sradh* of her deceased husband. Besides it appears to me that the imputation is utterly groundless. She is said to have left the house in company with Felu. This Felu, according to her account, which stands unrebuted, was an old trustworthy servant, *numasudra* caste, remaining in the house for a year after the death of the husband, and finally leaving it of his own accord. I do not think it to be supposed that this young woman, if she had been minded to indulge in illicit intercourse with this servant of the family, would have left the house openly and publicly in the company of that servant, instead of availing herself of opportunities which she must frequently have of carrying on the intercourse upon the premises? For it is admitted that the husband himself lived a reckless profligate life, and that he had a woman in the village whom he constantly visited. In these circumstances, it is not at all likely that the woman, if she had been really unchaste, would have left the house for the purpose of an immoral intrigue with an elderly servant. I think it to be a monstrous charge against this young woman, because she had quitted the house, and that in broad daylight she had done so for carrying on an illicit intrigue. On the contrary it appears to me far more probable and credible, that being a young woman, neglected by her husband, and probably ill advised, she quitted the house in a moment of irritation and excitement; whether to join the husband, or to go to her friend, there is no evidence to show except what she herself says, and if that is to be believed, it is clear she did not leave the house for any illicit purpose, and in that case there is no absolute end to any reason or probability for the husband having made such a will as is before us.

Then we find that the Judge relies, as one of the grounds

his decision, upon a supposed statement by the husband Grish Chunder to one of the witnesses Bycunt Nath Roy, made about the time of the Poojah, that it was not his intention to give any portion of his property to his wife, but so far from Bycunt Nath having mentioned any such statement in his evidence, he expressly said that the husband did not speak to him of any such thing. That appears not merely from the translation of the evidence before us, but from the Judge's own notes. In addition to that we have the evidence of Trilochun Chatterjee, who is a senior member of the family, and who, it is admitted, had been held in respect by Grish, and with whom Grish acted on occasions of family litigation and the like, and Trilochun says he is quite satisfied that Grish never had any such intention as that of disinheriting his wife. •

Then we have compared, as the Judge below compared, the signature on the will with the other admitted signature on the will with the other admitted signatures of Grish Chunder (and it appears to me that that circumstance also adds very great weight to the other considerations). The signature on the will, it seems to me, is clearly not that of Grish Chunder. It is a signature altogether of a different character from those on the other papers, and the two look like the signatures of different persons writing the same name.

Babu Kashaee Cant Sen has contended that in this case the Judge has decided upon positive evidence given before him, and that the case of the appellant rests upon probabilities and theories, and it would be unsafe for an Appellate to reverse the judgment of the Court below in such circumstances.

All that I can say is, that the Appellate Court is bound to take such risks. It has to give judgment upon the evidence. That is a duty imposed upon it by the law. We have considered the evidence, and we think we are in a position to say upon that evidence, that the will, purporting to have been executed by Grish Chunder, was really not executed by him, and ought not to have been admitted to probate.

I should add that, in my opinion, there is something to be inferred from the conduct of the parties.

This will had been really executed by Grish Chunder, as is

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contended for on the part of the mother, we should have expected probate to be immediately applied for. But what happened?

If the conduct of Annoda Sundari, the wife, had been as contended for, we should have supposed she would remain in the shade, conscious of her disgrace and wait until the action of the other side. But who comes forward? Almost immediately after the death of the husband the wife applies for a certificate. Did the other side come forward? No! The application is made in February, and it is not till April that a word is heard as to the will; what then are we to infer? That Annoda Sundari was guilty. Certainly not. The inference is that she was innocent.

In the certificate case, No. 272 of 1879, the appellant for the certificate is the widow.

• In the absence of any conduct or circumstance disqualifying her to act as the representative of her deceased husband, she of course is entitled to the certificate. There is a will set up on the part of the mother, but that we have just held not proved. The widow, therefore, will be entitled to the certificate. We give no separate costs in this appeal.

The judgment of the lower Court, therefore, will be reversed with costs.

TOTTEN-  
 HAM, J. TOTTENHAM, J. :—

I entirely concur in thinking that the will set up is not genuine, and that the judgment of the lower Court must be reversed. I also think that the widow is entitled to the certificate.

## [PRIVY COUNCIL.]

INDROMONI CHOWDHURI . . . . . APPELLANT ;

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Dec. 11th.

AND

BEHARI LALL MULLICK . . . . . RESPONDENT.

*Hindu Law—Adoption—Sudra adoption—Ceremonies.*

Among Sudras in Bengal no ceremonies in addition to the giving and taking of the child are necessary to constitute a valid adoption.

[Judgment of the High Court affirmed.]

**APPEAL** from a decision passed by a Full Bench (COWEN, C.J., JACKSON, PEAR, AINSLIE and MORRIS, J.J.) of the High Court, Calcutta, on the 23rd February 1879. The facts will be found in the report of judgment of High Court in 13 B. L. R., P.B., 401—*Behari Lall Mullick vs. Indromoni Chowdhuri*.

*Cowie, Q.C.*, and *Doyne*, for the Appellant.

No one appeared for the Respondent.

The judgment of their Lordships of the Judicial Committee (1) of the Privy Council was as follows :—

This suit was brought by the plaintiff, the widow of one Gopal Lall Mullick, to recover possession of property which formerly belonged to his nephew Gocool Chunder, who died in November 1841. Her case is that upon Gocool Chunder's death the property claimed descended to his widow Brojo Soondari, by whom it was enjoyed during her life ; that on her death, on the 3rd April 1868, devolved on Gopal Lall Mullick as the nearest collateral heir of Gocool ; that Gopal Lall Mullick, who died on the 7th October 1868, devised (for it is under a testamentary gift that she claims) all this interest in it to her. She treated Behari Lall as principal defendant, and alleged that he was fraudulently taking the property under the false pretence that Brojo Soondari adopted his brother Haran Krishna, and that he is the guar-

Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. S. ROBERT, P. COLLIER.

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dian of her adopted son. The defendants insisted upon the adoption as valid, and the question was thus reduced to one of title between the plaintiff and Haran Krishna. In this state of things the principal questions which arise on the Record are,—whether the will upon which the title of the plaintiff depends was executed by her husband; and, if so, whether her title was defeated by a valid adoption. This question of adoption of course involves two issues,—whether Brojo Soondari had authority to adopt; and whether she had in fact exercised that authority by adopting Haran Krishna. To these issues of fact has been superadded one of law, namely, whether, supposing the adoption to have been made in fact, but without certain ceremonies, those ceremonies were so essential to such an adoption that the omission to perform them invalidated that which would otherwise have been a good adoption. The lower Court found in favor of the plaintiff that the will had been executed; it found also that the authority to adopt, which, it was said, Brojo Soondari had exercised, had been given to her by her husband; but it also found that no adoption in fact by her in exercise of that power had been established; and that if it had been established, it would have been invalid for want of the necessary ceremonies. The High Court abstained from dealing with the issue as to the will, obviously because if the adoption were a good adoption, it would prevent any interest in the property from passing to Gopal Lall Mullick, and he therefore could have had none to dispose of in favor of the plaintiff. And, taking up in the first instance the issues as to the adoption, it found that the widow had authority to adopt; that she had duly exercised that authority; and having first referred to a Full Bench the question whether ceremonies were necessary and essential to an adoption in the case of Sadis and having received from that body a certificate that they were not essential, it adopted that finding, and so disposed of the question of law. The result was, that a decree dismissing the plaintiff's suit and the present appeal is against that decree.

Before considering the question of adoption it may be well to refer a little more particularly to some of the antecedent facts of the case. Gocool Chunder, as has already been said, died in November 1841. He left him surviving, not a

his widow, but Gobind Lall Mullick, his father. The estate in question had descended to him and a deceased brother Brojendro Chunder Mullick, from their maternal grandfather, either directly or through their mother Rashmoni Dossee,—it does not appear very clearly which. Brojendro Chunder Mullick died without children, and unmarried, and his eight-anna share passed by law to his father. For several years the father-in-law and the widow appear to have gone on harmoniously. She was probably very young, her husband having died young, and the father-in-law naturally administered the whole estate. Then quarrels began between them, and Gobind Lall seems to have conceived the notion of defeating the widow's estate altogether by setting up a case that his son Gocool Chunder had, in his lifetime, adopted a cousin Doyodro Nath by name, who was one of the grandsons of Gopal Lall Mullick. Litigation ensued, and in the course of that litigation the widow appears to have pleaded a written authority to adopt. The case was tried before a Principal Sudder Ameen, who decided against her authority to adopt, but also decided against the case of adoption by her husband which was set up by Gobind Lall Mullick. The result of this decision, if it had stood, would have been to confirm Brojo Soondari in her widow's estate, but with a negation of the genuineness of the written *anumati patro* which she had set up. On appeal, the Sudder Court took the somewhat singular course of saying that inasmuch as the property was situated in different zillahs, and their previous leave to bring the suit in the zillah in which it was brought had not been obtained, the whole proceedings were *non-judice* and must begin again. In that state of things, Gobind Lall Mullick, the father-in-law, died in the month of March 1858. Shortly after his death the solehnamah, or instrument of compromise, on which so much turns in this case, was executed between Gopal Lall Mullick and the widow. It contains clear admissions on the part of Gopal Lall that the case set up by his brother Gobind Lall as to the adoption of Doyodro Nath was a false case, and that the widow had an authority from her husband to adopt five sons in succession. It further contains the following provision:—"And you shall take your adopted son, in the manner prescribed by the shastras,

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the son born of the womb of the wife of Anund Mohun Mullick, your sister's husband; that is to say, the son born of the womb of your uterine sister; but if for any cause you cannot adopt that son, you shall, by adopting successively the sons of any other person or persons of the same caste with yourself, maintain in accordance with your husband's permission the line of persons by whom offerings of water and the funeral cake are to be made to yourself and your husband, and to the *pitriloka* (ancestors) of both of you." This solehnamah also contained a confirmation of the gifts which Gobind Lall was said to have made out of the eight annas share which he inherited from his son Brojendro Mullick, viz., two gifts of four annas, and of one anna to Gopal Lall Mullick, and a gift of the remaining three annas to Brojo Soondari herself; and, further, an agreement between the parties thenceforth to hold the estate in the proportions of eleven annas and five annas.

It appears to their Lordships impossible for the representative of Gopal Lall, claiming through him, to contend in the face of this document that there was no power to adopt. Two Courts, moreover, have found that there was authority to adopt, and their Lordships feel bound in this, if in any case, to adhere to their rule of not disturbing the concurrent finding of two Courts upon an issue of fact. It has, however, been strongly argued before them that, inasmuch as the widow once set up a written authority to adopt, whereas the witnesses who now speak to the adoption seek to prove only a verbal authority to adopt, so much discredit attaches to the case for the adoption that the witnesses, who deposed to it, are not to be believed when in conflict with those for the plaintiff. Their Lordships do not conceive that that argument is well founded. The solehnamah, it may be observed, does not itself state whether the authority to adopt was written or verbal. It may well be that according to the course, unhappily too common, of Hindu litigation, when the widow found that her father-in-law, who was the principal witness, if the story now told is true, to the giving the verbal authority to adopt, had turned round upon her and was seeking to dispossess her by setting up a false case of an adoption by her husband, she may have been advised, and may have been

foolish and wicked enough to adopt the advice, to set up a written authority to adopt which really never existed. And she may at the time, when the solehnamah was executed, have abandoned that case, and fallen back upon a verbal permission to adopt which was then admitted. But if this were so, her inconsistent conduct would not affect the credit of those witnesses who now speak to the verbal authority to adopt, and to the alleged exercise of it by her. Therefore, their Lordships think that this argument ought not to have much weight with them in determining the credit of the witnesses who have sworn to the adoption.

The story of the adoption, as told by the defendant's witnesses, is as follows :—"Brojo Soondari, who had previously adopted one Romesh Chowdhry, and after his death had taken some steps to procure in adoption a son of one Mozoomdar, an adoption, which it is clear on the evidence was never perfected, determined to adopt Haran Krishna, the second son of Anund Mohun Mallick, being a person answering to the description in the solehnamah of the child to be taken in adoption. The child was formally given and received in adoption at Brojo Soondari's house at Neemteela, in zillah Moorsshedabad, on the 20th of December 1867, corresponding with the 6th of Pous, B. 1274; but no religious ceremonies were performed on that occasion. A few days afterwards she went to a place, called Ashtamoonissa, in zillah Pubna, which was the home of her father, and took up her abode with Gourang Chunder Roy, her nephew or cousin, taking with her Haran Krishna, the adopted son. Three months afterwards, in the month of Cheyt, she caused the *putreshti jag* ceremonies, including the *Datta Homam* or burnt sacrifice, to be celebrated under her auspices in the house of this Gourang Chunder Roy; and on that occasion executed a wasseutnamah in favor of Behari Lall, authorizing him to act as guardian of, and manager of, the estate for the adopted son during his minority. On the following day, the 31st March 1868, she recognized the adoption by executing a perwannah to the said Behari Lall, declaring that she had adopted this child, that they were to pay their rent to Behari Lall on his account. She died at Ashtamoonissa, a few days afterwards, on the 3rd April 1868,

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and at her obsequies, which took place there, Haran Krishna took the part which it is usual and proper for a son of the deceased to take. After the return of the defendants to Neemteela there was a dispute as to the fact of the adoption, and Gopal Lall Mullick and his faction appear to have got possession, temporarily at least, of the house of Brojo Soondari at Neemteela. It is pretty clearly established that Gopal Lall Mullick performed or affected to perform the *sradh*, which is customarily performed 30 days after the death of the deceased at her house, whilst Haran Krishna, as her adopted son, was performing a rival *sradh* in the house of his natural father. But although Gopal Lall Mullick may have got temporary possession of the house, there is nothing to show that he ever got possession of the property. There is in the record some evidence of a threatened or apprehended disturbance, and of some persons having been bound over to keep the peace, but there is nothing to show how Haran Krishna got into possession, as he unquestionably did get into possession, or that Gopal Lall Mullick ever took any legal proceedings to disturb, or question that possession. That is the general effect of the evidence in favor of the adoption.

On the other side, there are a great many witnesses who deny altogether the fact of the adoption. Some of them, relying on the absence of the usual publicity, say, that if there had been an adoption they must have known of it; that they would have been invited guests, and would have been present at the ceremony; others again attempt to prove two distinct *alibis*, one being directed to show that Brojo Soondari was not at Neemteela, where the adoption is said to have taken place in the month of Pous, but had quitted it for Ashtamoonissa in the preceding month of Aughraun, or at some prior time; the other to show that Haran Krishna did not accompany her, but remained in the interval between Pous and Cheyt in the house of his natural father. It may be remarked that the most respectable witness who speaks to the presence of Haran Krishna, in the house of his natural father, at one time during this period, is the pleader who was examined first for the plaintiff, and that his testimony is not absolutely inconsistent with the defendant's case, because it is

part of that case that Haran Krishna was not at Ashtamoonissa during the whole time of Brojo Soondari's residence there, but in consequence of the illness of his natural mother, was sent back to his natural father's house at Neemteela for a time, returning in or before Cheyt to Ashtamoonissa. The evidence, however, of other witnesses who speak to the fact of his continued residence at Neemteela is utterly irreconcilable with the notion of his having gone with Brojo Soondari to Ashtamoonissa, or indeed with his ever having been there. Therefore there is a direct conflict of evidence, and it is perfectly impossible to reconcile the two stories. The learned Judges of the High Court seem to have gone very carefully through the evidence on both sides, and their Lordships are not disposed to dissent from the conclusion to which they came, that the testimony of the witnesses on the part of the defendant, and specially that of Gourang Chunder Roy, is more worthy of credit than that of the witnesses for the plaintiff. It is not necessary for their Lordships to go in detail through the evidence on both sides. It is sufficient to say that the conclusion to which the High Court came, is that to which their Lordships, after hearing the whole of the evidence read, would themselves have been disposed to come, and that they also think it is confirmed by the probabilities of the case. One of the arguments on the other side as to the improbability of the alleged adoption was founded upon the state of ill-feeling which is said to have existed, and which does seem, at one time, to have existed between Brojo Soondari and Anund Mohun and her sister. It is not, however, shown that that state of feeling, if it existed at one time, continued to exist up to the time of the alleged adoption. That it once existed is a circumstance which may perhaps explain why, instead of taking Haran Krishna in the first instance, Brojo Soondari adopted Romesh Chowdhry, and afterwards showed some disposition to adopt a second person out of the family; but it seems very difficult to reconcile the hypothesis that her hostility towards Anund Mohun and his wife continued up to the time of her death, with the unquestionable fact that Anund Mohun's son, Behari, was with her at Ashtamoonissa, a few miles distant from his and her ordinary abode, for some time before and up to the time of her death. The reasonable infer-

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ence to be drawn from that fact is, that whatever may have been the state of feeling at a previous time between Brojo Soondar and Anund Mohun, his branch of the family had been restored to her favor. Another point which was much argued as throwing discredit upon the evidence for the adoption was founded on a document which the High Court has held was not properly proved in the cause, and we certainly might have been better proved in the person to whom it is said to have been addressed had been produced as a witness. This is the letter which Anund Mohun is said to have written on receiving the news of Brojo Soondari's death to one Gour Soonder Chowdhry, and in which he is supposed to speak of her having executed a gift on her death bed in favor of his son Behari, a gift inconsistent with the alleged adoption. Their Lordships are not prepared to say that if this letter had been better proved it might not have been explained as referring to the wasseutnamah under which Behari has certainly acted as guardian of the adopted son, though the document itself is lost. On the other hand, the facts already stated as to the possession of the estate by Behari, as guardian for Haran Krishna, and the omission of Gopal Lall to take legal proceedings to obtain possession, and the purwana to the tenants, which the High Court has found to have been executed by Brojo Soondari in her lifetime, go far to corroborate the general truth of the oral evidence in favor of the defendant.

Upon the whole, therefore, their Lordships are of opinion, after weighing the evidence on both sides, that they must affirm the decision of the High Court as to the fact of adoption.

The next question to be considered is the correctness of the finding of the High Court to the effect that amongst Sudras in Bengal no ceremonies are necessary in addition to the giving and taking the child in adoption. The strongest argument against this proposition is, of course, founded on the 56th sloka of the 5th section of the Dattaka Mimamsa, which says:—"It is, therefore, established that the filial relation of adopted sons is occasioned only by the proper ceremonies, gift, acceptance, and burnt sacrifice, and so forth; should either be wanting, the filial relation even fails." It is admitted that whatever may be the force of the words "so forth" in the ori-

of Brahmins, or members of the other superior classes, the only religious ceremony that is essential to an adoption by a Sudra is the *Datta Homam*, or burnt sacrifice, which it is said he, though as incompetent to perform that for himself as he is to repeat the prescribed texts of the Vedas, may perform by the intervention of a Brahmin priest. The authorities, however, which have been with great candour fully cited by Mr. Cowie, show that it has long been questioned whether even the performance of the *Datta Homam* was essential to a valid adoption, at all events in the case of Sudras. Jagganatha lays down (3 Digest, 244) this broad proposition:—"The oblation to fire with holy words from the Veda is an unessential part of the ceremony; even though it be defective, the adoption is nevertheless valid;" and in arguing in support of this proposition he seems to make no distinction between Sudras and the superior castes. In the case before the Privy Council, *Sutrugun Saputty vs. Sabitra Dye*—2 Knapp, 287, (which it appears was a case between Brahmins), Lord Wynford says in his judgment:—"But although neither written acknowledgments nor the performance of any religious ceremonies are essential to the validity of adoptions, such acknowledgments are usually given, and such ceremonies observed, and notice given of the times when adoptions are to take place in all families of distinction as those of zemindars or opulent Brahmins, that wherever these have been omitted, it behoves the Court to regard, with extreme suspicion, the proof offered in support of an adoption." This statement of the law is perhaps of more value than it would otherwise have been, when it is considered that the case was argued on one side by Mr. Sergeant Spankie, who had great experience in India and probably was better acquainted than English Counsel at that period generally were with questions of Hindu usage and law. It cannot, however, be considered as more than a dictum, since the decision was against the adoption as a fact. It was, nevertheless, in accordance with the law as laid down by Sir Thomas Strange, at pp. 83 and 84 of the volume of his treatise, first edition, and the authorities cited in it. Then it has been more recently decided in the Madras Court that even in the case of an adoption by a Brahmini

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woman the ceremony is not necessary. Their Lordships intend to follow the example of the High Court in this case in not considering to what extent the Madras decision is correct, and how far the ceremonies may be omitted in the case of adoption by a Brahmini woman. They may, however, observe that the reasoning of the Madras Court applies even *à fortiori* to Sudra. The other Indian decisions which have been cited, and particularly those of the late Sudder Dewani Adawlut, clearly show that the present question has long been treated as an open and vexed one by Pundits as well as Judges. It was so treated in a case before their Lordships in 1872—*Sreenarain Mitter vs. Sreenis Krishna*, 11 B. L. R., P. C., 171, but was not then decided, the suit being dismissed upon another ground. Lastly, the Full Bench in this case appears to have satisfied itself that the passage in the Dattaka Nirnaya, upon which Pundit Shama Churn Sircar in his Vyavastha Darpana relies as an answer to those who deny that the performance of *Datta Homam* is essential to an adoption by a Sudra, is in fact an authority the other way.

Upon the whole, then, their Lordships have come to the conclusion that the weight of authority is in favor of the finding of the Full Bench of the High Court.

They would have been sorry to come to a different conclusion because, although it may be true that the use of the ceremony in question on the occasion of an adoption is so general amongst Sudras that the absence of it may fairly, as Lord Wynford observed, cast suspicion upon a doubtful case of adoption, yet to hold that where the giving and taking of a child in adoption are established, the omission of the ceremony invalidates that adoption would mischievously, as they conceive, strengthen the meshes of the purely ceremonial law, and tend to encourage suits to impeach *bonâ fide* adoptions. Their Lordships, agreeing with and adopting the finding of the Full Bench of the High Court, do not think it necessary to consider what would be the effect of the subsequent ceremonies performed at Ashtamoonam as a remedy of any defect which, up to that time, may have existed in the adoption. They only observe that they have not been referred to any distinct authority; that the defect may not be so supplied, particularly in cases where, as here, according to

the evidence, it was from the first announced that the ceremonies usually incident to an adoption would take place at a subsequent time.

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The title of the defendant being established, their Lordships need not consider whether the will, which is an essential link in that of the plaintiff, has been proved; and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. There will, of course, be no order for costs, the case having been heard *ex-parte*.

### [CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF JITBAHAN *vs.* BANSRUP DHOBI.

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*Criminal Procedure Code (Act X of 1872), section 530—Parties.*

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Where there is a dispute likely to lead to a breach of the peace concerning land, and proceedings are recorded and had under section 530 of the Criminal Procedure Code, no order should be made against one who is acting as the servant of another person who claims to have possession of the land, unless that other persons is made a party to the proceedings.

**C**RIMINAL REFERENCE under section 296 of the Criminal Procedure Code, submitted by the Judicial Commissioner of Chota Nagpore.

The circumstances were these:—

On the 14th November 1879 Jitbahan, the complainant, presented a petition in the Court of the Deputy Commissioner of Lohardugga, stating that he held a zuripeshgi lease of a particular village from one Asaram, and that while he was in possession under this lease, one Bansrup, the servant of Gunesh Sahu, who had purchased Asaram's rights in the village at auction, had taken possession, and was preparing forcibly to cut and carry off his crops.

On the following day, the petitioner and Bansrup, both being present, the Deputy Commissioner recorded that he considered a breach of the peace was imminent, and ordered both to put in written statements. The first party, Jitbahan put his state-



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 v.  
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 DHOBI.  
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 —

ment the same day, but Bansrup did not put in any statement. It appeared that he was imprisoned in another case on the same day. The case was then postponed for three days till the 18th on which day it was taken up, and in the absence of Bansrup and Gunesh, and without any further enquiry or proceeding decided in favor of Jitbahan who was declared to be in possession.

Two days after this order was recorded, i.e., on the 20th November, Gunesh, the master of Bansrup, petitioned the Deputy Commissioner, urging that he was in *bona fide* possession of the property in dispute, praying that he might be heard and might be given an opportunity of bringing forward evidence in his behalf. This petition was disallowed on the 30th December, the Magistrate declining to re-open the case.

The following order was made by the Court (1) upon this reference :—

It is quite clear on the original complaint of Jitbahan, on which the Deputy Commissioner instituted proceedings under section 530, that Bansrup was acting as the servant of Gunesh, who had purchased certain rights in the village, and therefore Gunesh should have been made a party to the proceedings. It was certainly improper to decide the matter in the absence of Bansrup who was in jail under sentence, and in the absence of Gunesh.

We, therefore, set aside the orders passed under section 530.

(1) PRINSEP and TOTTENHAM, J.J.

## [CIVIL APPELLATE JURISDICTION.]

SHARODA PROSAD CHATTO- }  
 PADHYA . . . . . } (DEFENDANT) APPELLANT ;

AND

BROJO NATH BHUTTACHARJI (PLAINTIFF) RESPONDENT.

1880  
 March 19th.

No. 888 of  
 1879.

*Limitation Act, XV of 1877, section 10, and Sched. II, Art. 120—Account,  
 Suit for, against Trustee.*

A suit against a defendant for an account of monies, received and disbursed by him as trustee appointed during the minority of the plaintiff, is not a suit for the purpose of following trust property in his hands within the meaning of section 10 of the Limitation Act, XV of 1877.

The limitation applicable to such a suit is that provided by Art. 120, Sched. II, of that Act.

English Cases of a like nature distinguished.

**A**PPEAL from a decision passed by the District Judge of East Burdwan, reversing a decree of the Moonsiff of Raneegunge.

The plaintiff in this suit, which was instituted on the 11th May 1878, alleged that his late father, before his death in 1276, made over the whole of his property in trust to the defendant for his maintenance during his minority, and with a direction that what remained on his coming of age should be made over to him; that the defendant accepted the trust, but, on his (the plaintiff's) coming of age, had not rendered an account of his trust, or made over to him the surplus that remained after the minority. It was alleged also by the plaintiff that he came of age in 1284.

The defendant denied that he had been appointed trustee or guardian of the plaintiff. He also pleaded limitation.

The Moonsiff found that the plaintiff came of age in 1278, and that the cause of action, assuming the alleged facts, arose from the date on which he attained his majority. He further held that the period of limitation was that prescribed by Article 120 of Act XV of 1877, Sched. II, viz., six years, and dismissed the suit as barred by limitation.

The District Judge reversed the decision of the Moonsiff. He considered that, such a suit as that before him was saved under

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section 10 of Act XV of 1877. "The fact," he said, "that the plaintiff asks for an account, does not alter the real nature of the suit; for the taking of an account is only a step towards recovering the trust property to which the plaintiff may be entitled, when such an account has been taken."

On the facts he found that the defendant had accepted the trust created by the plaintiff's father, that he had received a sum of money at the time, and had managed the property for some years. He accordingly reversed the decision of the Moonsiff.

The defendant appealed to the High Court.

Baboo Opendro Chunder Bose, for the Appellant.

Baboo Nogendro Nath Roy, and Baboo Umbica Churn Ghose, for the Respondent.

The judgment of the Court (1), which was as follows, was delivered by

WHITE, J. WHITE, J. :—

The respondent (who was the plaintiff in First Court) alleging that his deceased father had, at the time of his death, in the Bengal year 1276, appointed the appellant (who was the defendant in the First Court, manager of all the plaintiff's properties during his minority, and had entrusted the defendant with the charge of bringing the plaintiff up and of making over to him his property when he should attain his majority, and further alleging that the defendant accepted the trust, but had refused to render an account, brought this suit for an account of the property delivered to, and put in charge of, the defendant by the deceased father, and of his receipts and disbursements in respect thereof.

The defendant denied that he accepted the trust or managed any of the affairs of the plaintiff, and also pleaded that the suit was barred by the law of limitation.

The Moonsiff held that the period of limitation of such a suit as the plaintiff's was six years under Article 120 of the Limitation Act (Act XV of 1877), and that the right to sue when the accused plaintiff attained his majority, and that as more than six years had elapsed between his attaining majority and bringing this suit it was barred.

(1) WHITE and MACLEAN, J.J. •

The Moonsiff also went into the merits of the case, and held that the defendant had not been appointed manager of the plaintiff's property during his majority, nor had he accepted any trust in connexion with the same.

The learned Judge reversed the Moonsiff's findings on both points. He held that the defendant had accepted the trust created by the plaintiff's father, and had managed the property for some years after the death of the plaintiff's father, and in particular that a sum of Rs. 127 had been entrusted by the plaintiff's father to the defendant for the use of the plaintiff. As regards limitation the Judge was of opinion that the suit was exempt from the operation of the Statute by virtue of section 10 of the Limitation Act. But as he believed that the plaintiff took over charge of his deceased father's property in 1283, he limited the account to be taken to the years commencing 1277 and ending 1282.

The defendant urges in appeal before us that section 10 does not apply to the suit, but that the suit is barred by the operation of Article 120 of the Act.

In England the Statute of Limitation does not apply to a suit for an account brought by a *cestui que trust* against his trustee under an express trust, or by a principal against an agent expressly appointed (*Obee vs. Bishop*, 1 D. F. and J., 137; *Wedderburn vs. Wedderburn*, 4 Myl. and C., 42; *Brittlebank vs. Goodwin*, L. R. 5 Eq., 545; *Burdick vs. Garrick*, L. R. 5 Ch. Ap., 233; *Story v. Gope*, 2 Jur. N. S., 706; *Stone vs. Stone*, L. R. 5 Ch. Ap., 74), although in certain cases where the relation of trustee and *cestui que trust* is admitted to be no longer subsisting, and in a few other cases a Court of Equity will refuse relief on the ground of lapse of time.

The English doctrine does not appear to rest upon an exemption, express or implied, to be found in the English law of limitation, but to be the creation of the Equity Judges. It is now expressly recognised by the Legislature, which, in the Judicature Act (36 and 37 Vic. Cap. 66, sec. 25, cl. 2), enacts that "no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitation."

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 —  
*Judgment.*  
 —  
 WHITE, J.

In India suits between *cestui que trust* and trustees for account seems to be governed solely by the Indian Limitation Act, and, unless they fall within the exemption of section 10, liable to become barred by some one or other of the articles of the second schedule of the Act. To claim the benefit of section 10, the suit against the trustee must (amongst other things) be for the purpose of following the trust property in his hands. The plaintiff's present suit has no such object. It is plain that its object is not to recover any property in *specie*, but to have an account of the defendant's stewardship which means an account of the monies received and disbursed by the defendant on the plaintiff's behalf, and to be paid any balance which may be found due to him on taking the account.

I think, therefore, that the learned Judge is in error in holding that the suit falls under the description of suits mentioned in section 10, and that the Moonsiff was right in holding that Article 120 applies to the suit.

If the learned Judge below had found the date when the plaintiff attained his majority, it would probably have been unnecessary to remand this suit. The plaintiff alleges in his plaint that he attained his majority in Kartic 1284, but the Moonsiff found that he reached his full age in 1278. The learned Judge pronounced no opinion on this point, it being unnecessary in the view which he entertained of the case. The plaintiff, however, is entitled to have the opinion of the lower Appellate Court on the question of fact, as it formed one of the grounds of his appeal to the lower Appellate Court. It will, therefore, be necessary to remand the suit to try this question.

If the Judge finds that the plaintiff attained his majority more than six years before he commenced the suit, he will dismiss the plaintiff's suit.

If he finds this issue in the negative, he will order the account to be taken for the period of time, and as directed by the learned Judge Mr. Field.

The appeal is allowed. The cost of the appeal and of the suit on the remand will abide the result.

## [ORIGINAL CIVIL JURISDICTION.]

KHETTER CHUNDER MOOKERJEE . . . . .

1879  
April 2nd.

AND

KHETTER PAUL SREETEERUTNO AND OTHERS . . . . .

No. 255 of  
1879.*Evidence Act (I of 1872), sections 65, clause (c) and section 90—Will, thirty years old—Document 30 years old, and lost.*

If a document be shown to have been lost in proper custody, and to be more than thirty years old, secondary evidence of its contents may be given under section 65, clause (c) and section 90 of the Evidence Act, without proof of execution.

THIS was a suit for a declaration of title to, and for the recovery of, possession of certain land and premises in the possession of the defendants.

The plaintiff claimed to be entitled to the property in suit by right of succession to one Shib Chunder Bhattacharjee, whom he alleged to have died intestate about 35 years ago.

The defendant, on the other hand, claimed to be entitled to the property in virtue of sale to him by Sreemutty Bedomoyee Dabee, the grand-daughter of Shib Chunder Bhattacharjee. Sreemutty Bedomoyee Dabee, he alleged, held and was entitled to the property under a will, executed by her grandfather Shib Chunder, dated the 6th Srabun 1237.

It appeared from the evidence that this will had been produced upon a former occasion, about eight years before this suit, by Sreemutty Bedomoyee Dabee, upon the occasion of her obtaining a loan. It was pledged to the lender, and afterwards returned by him, on the loan being repaid.

While in the custody of Sreemutty Bedomoyee Dabee, after being so returned, it was lost.

*Danaud* (for the defendants) tendered a copy of this will, but having given any proof of the execution of the original.

*A. Apar* (for the plaintiff) objected that it was inadmissible. He contended that under section 90 of the Evidence Act it



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was necessary that the original document should be produced in Court.

Mr. Justice WILSON made the following order admitting the document :—

I think this document is admissible. There are two questions to be considered, first the proof of the contents, and second the proof of the execution.

Section 65 of the Evidence Act deals with the first of these questions, and the document tendered comes under clause (c) of that section, which provides that secondary evidence may be given of the contents of a document “when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason, not arising from his own default or neglect produce it in reasonable time.” The will in question has been shown to be lost, and therefore its contents may be proved by secondary evidence.

Section 90 deals with the second question. Under that section if a document, purporting or proved to be 30 years old, is produced from any custody, which the Court in the particular case considers proper, the Court may presume that the signature and every part of such document which purports to be in the handwriting of any particular person is in that person’s handwriting. According to the explanation to the section documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be.

It has been argued that under this section the original document must be produced in Court. That is too narrow a construction to put upon the words of the section.

The original will has been shown to have been lost in proper custody, and it is more than thirty years old. I think, therefore, that secondary evidence of its contents may be admitted without proof of the execution.

## [PRIVY COUNCIL.]

TIRU KRISHNAMA CHURIAR } (PLAINTIFFS) APPELLANTS ;  
AND OTHERS . . . . . }

1879  
March 18th.

AND

KRISHNA SWAMI TATA } (DEFENDANTS) RESPONDENTS.  
CHURIAR AND OTHERS. . . }

*Case of Action—Religious Services, Right to perform—Act VIII of  
1859, section 32.*

A suit will lie to recover a specific pecuniary benefit to which the plaintiffs declare themselves entitled on condition of performing certain religious services, and if to determine the right to such pecuniary benefit it becomes necessary to determine incidentally the right to perform the religious services, the Court has jurisdiction to consider and decide the point.

[Judgment of the High Court of Madras reversed.]

APPEAL from a decision passed by a Divisional Bench of the High Court of Madras.

*Mayne*, for the Appellants.

No one appeared for the Respondents.

The facts sufficiently appear from the judgment of the Judicial Committee (1), which was as follows :—

This is an appeal from a judgment of the High Court of Judicature at Madras, rejecting a plaint under the 32nd section of the Code of Civil Procedure as containing no cause of action—a proceeding equivalent to what in this country would be called judgment on demurrer. The only question before their Lordships is whether or not the plaint discloses any cause of action. Of course, we have nothing to do with the question whether the cause of action, if any is stated, be well founded, or what may be the merits of the case. The declaration is by a large number of persons belonging to the Tenkalai sect against other persons

Sir JAMES COLVILLE, Sir MONTAGUE E. SMITH, and Sir ROBERT P.

COLLIER.



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*Judgment.*

belonging to the Vadakalai sect. The substance of the plaint, which undoubtedly is not very clear, may be thus stated. It begins by declaring that the plaintiffs have the exclusive right to the Adhyapaka miras of reciting certain religious texts, hymns, or chants in a certain pagoda and its dependencies, and deny the right of the defendants to recite them. Then comes an allegation which appears important: "The plaintiffs and the Brahmins of the plaintiffs Tenkalai sect have been for a long time past, and up to this day discharging all the duties appertaining to the said Adhyapaka miras right, and enjoying the incomes of the Adhyapakam, save those mentioned in Schedules B. and C." The plaint goes on to allege that the defendants holding the office of Dharmakarta of the pagoda, in combination with other persons in rivalry with the plaintiffs, recited the Vadakalai invocations, chants and other religious prayers, the exclusive right to recite which was incident to the plaintiffs Adhyapaka miras; that thereupon a complaint was preferred to the Magistrate and a report made, and for a time the defendants ceased to recite the chant and prayers in question, but that they again wrongfully recited them, and injured the exclusive right of the plaintiffs and others to recite them; but there is an allegation that the plaintiffs did not themselves perform or were prevented from performing these rites. On the contrary, the allegation is that they did perform them. Section 6 goes on to say: "The defendants having withheld the payment to the plaintiffs of some of the several incomes of the Adhyapaka miras due to the plaintiffs in the said Devaraja Swami's Pagoda, as well as in all the Sannidhis attached to it, the plaintiffs instituted suit No. 66 of 1865, on the file of the District Munsiff's Court of Conjeveram, against the defendants, and this litigation went up as far as the High Court, and continued until March 1873, when a decision was passed in favor of the plaintiffs." The plaint further alleges (and this is the present cause of action): "The defendants have withheld payment to the plaintiffs and the others of the Tenkalai sect of the amount of income mentioned in Schedule C. for the six years from the date of the said suit No. 66 up to this day, to which the plaintiffs and the others of the Tenkalai sect are entitled, as also of the

incomes which are mentioned in Schedule B, and which were being enjoyed by the plaintiffs and the others of the Tenkalai sect from the date of the said suit No. 66 until the final decree was passed by the High Court, save such as are now being enjoyed. They have also withheld from the plaintiffs, and the others of the Tenkalai sect, the honors mentioned in Schedule A, from April 1873." Then follows a prayer that the Court will pass a decree directing the defendants and others to abstain from reciting, and establishing the exclusive right of the plaintiffs, and also seeking to recover the value of various items stated in the schedules. Schedule C, which is to be found at the end of the schedule attached to the plaint, is in these terms: "Amount due for six years from October 1870, up to the current month, at the annual rate of Rs. 57-5-9, as mentioned in the decree in the original suit No. 66 of 1865, on the file of the District Munsiff's Court of Conjeveram, Rs. 344-2-6. On reference to the record, this suit appears to have been brought by substantially the same plaintiffs (with some changes) against substantially the same defendants. The Munsiff, before whom the case was originally tried, affirmed the claim of the plaintiffs to the Adhyapakam miras, and decreed that the sum of Rs. 57-5-9, as wages for the duty performed, should be paid to them by the defendants, these "wages" being in fact the money value placed by the Court on certain payments in kind chiefly in the shape of food.

On appeal this decision of the Munsiff was reversed by the District Judge, being the first Court of Appeal, on the ground that no suit would lie in respect of the matter complained of. His decision was reversed by the High Court of Madras, who remanded the case, observing: "The claim is for a specific pecuniary benefit to which plaintiffs declare themselves entitled on condition of reciting certain hymns. There can exist no doubt that the right to such benefits is a question which the Courts are bound to entertain, and cannot cease to be such a question, because claimed on account of some service connected with religion. If to determine the right to such pecuniary benefit it becomes necessary to determine incidentally right to perform certain religious services, we know of no

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*Judgment.*

principle which would exonerate the Court from considering as deciding the point." In pursuance of this judgment, which appears to their Lordships to be perfectly correct, the cause was again tried by the Court of First Appeal which somewhat increased the amount that the Munsiff had given. The High Court upon further appeal affirmed the judgment of the Munsiff, re-establishing the amount by way of annual payment at Rs. 57-5-9. It therefore appears that the plaintiffs in the present suit having recovered in the former suit up to the date of the commencement of that suit the sum of Rs. 57 for certain services performed, are now seeking to recover the amount of wages they have accrued due to them for six years since the date of the suit at the same annual amount in respect of the same services which they allege themselves to have continued to perform, their performance not having been prevented, although possibly to a certain extent interfered with by the defendants. So much with respect to Schedule C.

Schedule B. relates to another class of payments, as they are described in the schedule in kind; that is, in the shape of rice and other food which are described as due to the plaintiffs. The first item in the schedule is to this effect: "One Poli (circular cake made of wheatflour, Bengal grain, sugar and ghee) due to Adhyapakam at the close of the Tiruppavai." Most of the other items are of the same character. Their Lordships do not understand these articles as consisting of mere presents made by the devout, but as certain payment in kind of the same nature as those comprised in Schedule C. which are now claimed by the plaintiffs from the Dharmakartas of the temple which the defendants are, in respect of services performed. At the close, however, of this schedule their Lordships observe a statement of an approximate sum claimed for presents made annually to the Adhyapakas by the adjoining villagers for the Tenkalai people. It may be that no action will lie for the recovery of this last item, or in respect of the honors mentioned in Schedule A. as alleged to have been withheld from the plaintiffs; but the circumstance would not justify the rejection of the whole claim if it discloses a good cause of action in respect of Schedule and the greater part of Schedule B.

The judgment of the High Court, now appealed against, which rejects this plaint, is in these terms: "We think the plaint was properly rejected under the 32nd section of the Code of Civil Procedure. The allegations rejecting the 'Miras of reciting prayers,' and the exclusive right of recital in a stated form and order which the plaintiffs ask the Court to establish and to protect from infringement by the defendants, do not disclose a cause of action: Nor in our judgment does that portion of the plaint which alleges the withholding payment of certain specified sums which are described as 'the value of the incomes mentioned in Schedules B. and C.' A reference to the schedules discloses nothing more than a list of cakes and offerings to which a money value is assigned.

"Reading the plaint and schedules together, they express no more than this,—that presents and offerings usually given have been withheld. If, as now alleged, the plaintiffs intended to claim emoluments or legal dues of right receivable by them for services rendered, it is sufficient to say they have failed to do this."

Their Lordships are unable to concur in this judgment. For the reasons which have been stated they take a different view of the plaint and of the schedules which have been referred to. It appears to them that the schedules are more than a mere list of cakes and offerings to which a money-value is assigned; that they disclose a claim, whether well founded or ill-founded, as of right to certain dues for services performed. Schedule C., to an annual payment for wages which has been assessed in the previous suit and adjudicated upon as due to them. Schedule B., to certain other payments in kind, presumably capable of a money-value, which had been made to them up to the judgment in the former suit, but which had been since withheld.

This being so, the action falls within the principle of the judgment by which the former suit was remanded, and of other cases in which their Lordships' attention has been called.

They are therefore of opinion, that the judgment should be reversed, and the case remanded for the purpose of trial, and that the appellant is entitled to the costs of this appeal; and they will humbly advise Her Majesty to this effect.

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Judgment.

## [CRIMINAL JURISDICTION.]

1880  
April 9th.

No. 1314 of  
1879

PRAYAG SINGH AND ANOTHER . . . . .  
AND  
FUZOOL HOSSEIN AND OTHERS . . . . .

*Criminal Procedure Code (Act X of 1872), section 530—Decree, Resistance to execution of—Possession—Civil Procedure Code, Act X of 1877, Chapter XIX.*

A Criminal Court ought not to interfere in cases where a purchaser under a decree is resisted in getting actual possession of the property which he has bought, the procedure to be adopted in such cases being that provided in Chapter XIX of the Civil Procedure Code.

**C**RIMINAL REFERENCE under section 296 of Act X of 1872, submitted by the Officiating Judge of Patna.

The circumstances under which the reference was made sufficiently appear from the judgment of the High Court.

Mr. R. E. Twidale, for the Petitioner.

Mr. C. Gregory, Contra.

The judgment of the High Court (1) was as follows :—

WHITE, J. WHITE, J. :—

I think that in accordance with the suggestion of the District Judge at Patna, the orders, to which he has called our attention in his letter of the 19th December of 1879, should be set aside.

The orders referred to form parts of one order made by the Deputy Magistrate. It is dated the 29th of September in that year, and purports to be made under section 530 of the Code of Criminal Procedure.

The first part of the order purports to confirm Prayag in possession of the disputed land, but is based upon no evidence on the part of Prayag Singh that he was in actual possession either before or at the date of the enquiry.

(1) WHITE and MACLEAN, J.J.\*

The evidence does not amount to more than this,—that Prayag, under certain decrees against the former owner of the land, had, prior to the enquiry, been given symbolical possession of the lands by the Court in execution of those decrees.

Fuzool Hossein and Subhanah Hossein, who are called the second party in the proceedings before the Deputy Magistrate, were no parties to either of these decrees.

The Deputy Magistrate in his judgment finds “that the second party are resorting to force to keep Prayag out of his property.”

The Deputy Magistrate appears to think that in such a state of things he is bound to interfere under section 530. He says, after referring to the contumaciousness of the second party, “they by force and show of criminal force are trying to keep Prayag out of the land which the Civil Court has given him possession of. The pleader for the second party actually argued that this was a purely symbolical affair, and carried no weight. No doubt if contumacious men like Fuzool Hossein and Subhanah Hossein turn out with an unlawful assembly and refuse to acknowledge such possession being given, nothing short of force on the part of the Civil Court peon will be of use, and this is a state of things that cannot be tolerated for a moment.” The Criminal Court may properly enquire into and punish a riot or an unlawful assembly if proved. But it altogether oversteps its province when, under section 530 of the Civil Procedure Code, it interferes in cases where a purchaser under a decree is resisted in getting actual possession of the property which he has bought. And this is what the Deputy Magistrate has done in the present case.

The Civil Code, in Chapter XIX, sections 334, 335, prescribes the procedure to be adopted when resistance is offered to a purchaser under a decree in getting possession of immoveable property.

The second part of the order directs Fuzool and Subhanah each to give security in Rs. 1,000 to keep the peace towards the first party for one year. As the second part of the order was passed to prevent a breach of the peace by the second party in consequence of their being turned out of possession under the first part of the order, and as the effect of setting aside the first part

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 —  
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of the order will be to restore Fuzool and Subhanah to possession of the land which is the bone of contention between them, the second part of the order will fall with the first part, and the entire order of the 29th of September will be accordingly set aside.

[CIVIL APPELLATE JURISDICTION.]

March 19th. LUTF ALI KHAN . . . . . APPELLANT ;  
 No. 25 of 1879. FIKIRA SINGH . . . . . AND  
 RESPONDENT.

*Rent, Suit for, under a Settlement—Issues raised—Admission by defendant—Assessment.*

In a suit for rent, based upon an alleged settlement, the plaintiff failed to prove such settlement. *Held*, that no issue having been raised as to what was the fair and proper value of the land, the plaintiff was not entitled to have that question determined.

**A**PPEAL from a decision passed by the Subordinate Judge of Patna, reversing the decision of the Second Moonsiff of Patna.

In this case the plaintiff sued for rent, in respect of 43 beegahs of land held by the defendant. The plaintiff alleged that the defendant previously held 61 beegahs at different rates; that out of these 61 beegahs 20 fell to his (the plaintiff's) share in a butwara; that subsequently he granted to the defendant a settlement of the 20 beegahs together with other 23 beegahs at a *jumma* of Rs. 192-9.

The defendant denied the settlement, but admitted that the *jumma* of the lands in question amounted, at the rates at which they had been previously held, to Rs. 63 only.

It was found that the *jumma* of the original 61 beegahs was Rs. 95, and that the average *jumma* of the 23 beegahs was Rs. 4 per beegah. The Moonsiff, therefore, assessed the rent at Rs. 126-12, and gave a decree accordingly.

The Subordinate Judge, however, held that the plaintiff was not entitled to more than the amount admitted by the defendant, inasmuch as the suit was not for assessment of the fair value, and that no issue as to the proper value was raised.

The plaintiff appealed against the decision of the Subordinate Judge to the High Court.

Baboo Chunder Madhub Ghose, for the Appellant.

Mr. M. L. Sandel, for the Respondent.

The judgment the Court (1), which was as follows, was delivered by

PONTIFEX, J. :—

In this suit plaintiff sued the defendant for the rent of 43 odd beegahs of land at the rate of Rs. 4, and he chose to leave his case upon a settlement which he alleged had been come to in the year 1866 between him and the defendant, and an issue was accordingly raised in the First Court whether or not such a settlement had actually been come to. No issue was raised as to what was a fair value of the land, and what rent ought to have been paid for it.

In the trial of the case both Courts concurred in holding that plaintiff had failed to prove the settlement which he set up.

Inasmuch as plaintiff failed to prove his case the decree of the lower Court was, that he should be satisfied with the rent at the rate admitted. We think that as plaintiff made a case which he failed to prove, and as no issue was raised as to what was the proper amount of rent, plaintiff is not entitled to have that question determined in this suit.

In the suit only one of two things could be done. Either the suit would have to be dismissed altogether, or what seems to have been allowed by the Court below, the plaintiff must be satisfied with the rent admitted by the defendant to be due. The appeal is dismissed with costs.

(1) PONTIFEX and McDONELL, J.J.

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Judgment.

PONTIFEX, J.



## [CIVIL APPELLATE JURISDICTION.]

1880  
March 19th.

No. 258 of  
1879.

MUHAMDEE BEGUM (OBJECTOR) . . . APPELLANT;

AND

NAZIRUN, AS GUARDIAN OF HER MINOR SON, }  
TABARUK HOSSEIN, (PETITIONER) . . } RESPONDENT.

*Minor—Act XL of 1858—Appeal from order under section 18 of Act XL of 1858—Certificate withheld under certain circumstances.*

An application for a certificate under Act XL of 1858 ought not to be granted when there is a minor who has almost attained his majority, unless under special circumstances, as where very great weakness of mind in the minor is proved, or where it is shown that there is some absolute necessity for the certificate being granted.

Under section 18 of Act XL of 1858, an appeal is allowed to any person injured by an order under the Act.

**A**PPEAL from an order passed by the Judge of Patna.

This was an application for a certificate under Act XL of 1858, by the mother of one Tabaruk Hossein, who was alleged to be a minor.

It appeared that Tabaruk was of improvident habits and had been squandering his property. The application was opposed by Mussamut Muhamdee Begum, who had purchased from Tabaruk Hossein, for full value, she alleged, certain of his property. She further alleged that he was of full age.

The District Judge found that Tabaruk Hossein was under the age of 18 years, but that he almost attained that age.

He was of opinion that that being so, "the mother, however long she might have delayed in applying for a certificate, was entitled to get one, with a view to protecting the property, not only against others, but against the minor's own extravagance and folly," and accordingly granted the application.

Mussamut Muhamdee Begum thereupon appealed to the High Court.

Moonshee Mahomed Yusoof, and Mr. M. L. Sandel, for the Appellant.

Mr. C. Gregory, and Baboo Saligram Singh, for the Respondent.

## [CIVIL APPELLATE JURISDICTION.]

1880  
March 19th.

No. 258 of  
1879.

MUHAMDEE BEGUM (OBJECTOR) . . . APPELLANT;

AND

NAZIRUN, AS GUARDIAN OF HER MINOR SON, }  
TABARUK HOSSEIN, (PETITIONER) . . . } RESPONDENT.

*Minor—Act XL of 1858—Appeal from order under section 18 of Act XL of 1858—Certificate withheld under certain circumstances.*

An application for a certificate under Act XL of 1858 ought not to be granted when there is a minor who has almost attained his majority unless under special circumstances, as where very great weakness of mind in the minor is proved, or where it is shown that there is an absolute necessity for the certificate being granted.

Under section 18 of Act XL of 1858, an appeal is allowed to a person injured by an order under the Act.

**A**PPEAL from an order passed by the Judge of Patna.

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It appeared that Tabaruk was of improvident habits and had been squandering his property. The application was opposed by Mussamut Muhamdee Begum, who had purchased from Tabaruk Hossein, for full value, she alleged, certain of his property. She further alleged that he was of full age.

The District Judge found that Tabaruk Hossein was under the age of 18 years, but that he almost attained that age.

He was of opinion that that being so, "the mother, however long she might have delayed in applying for a certificate, was entitled to get one, with a view to protecting the property of the minor only against others, but against the minor's own extravagance and folly," and accordingly granted the application.

Mussamut Muhamdee Begum thereupon appealed to the High Court.

Moonshee Mahomed Yusoof, and Mr. M. L. Sandel, for the Appellant.

Mr. C. Gregory, and Baboo Saligram Singh, for the Respondent.

The judgment of the Court (1), which was as follows, was delivered by

1880  
 MUHAMDEE  
 BEGUM  
 v.  
 NAZIRUN.

PONTIFEX, J. :—

*Judgment.*

We think that this is not a case in which a certificate ought to have been granted under Act XL of 1858. The applicant in the Court below was Mussamut Nazirun, and according to her own statement, at the time she made her application, her son Tabaruk Hossein was within a very few months of attaining majority, and at the time when the learned Judge's order was made, in August 1879, he must have been within a few days of attaining his eighteenth year.

In the Court below Mussamut Muhamdee Begum was, either at her own instance or by the action of the opposite party, made a party to the proceedings, and Tabaruk Hossein himself also took objection to the certificate being granted. The objector Muhamdee Begum claimed to hold a mocurrari from the alleged infant made in the preceding March, and she would certainly be prejudiced if the certificate is allowed to stand.

We think that applications for certificate under Act XL of 1858, the result of which would be to prolong minority from 18 to 21, ought not to be granted when the alleged minor is admittedly so near his majority of 18, as in this case, unless under particular circumstances as where very great weakness of mind is proved, or where it is shown that there is some absolute necessity for it. We have had the evidence read to us, and we do not think that any sufficient reason appears for the grant of certificate. We are not satisfied even that the evidence shows that the alleged infant was, at the date of the judgment, a minor. The Judge, it appears, was satisfied with the evidence, because the witnesses stated that Tabaruk was born some twenty-five days before his father's death. But the evidence as to the date of the father's death does not appear to be at all satisfactory. However, we do not intend to prejudge that question. If Tabaruk was an infant at the time that he executed this mocurrari lease he will be bound thereby. The case must be determined upon its

(1) PONTIFEX and McDONELL, J.J.

1880  
 MCHAMDER BEGUM  
 v.  
 NAZIRUN.  
*Judgment.*  
 PONTIFEX, J.

merits. We think the lower Court ought not to have granted a certificate in this case, the result of which would be to prolong the tutelage of Tabaruk for three years.

A question has been raised whether the appellant here has any *locus standi* in appealing to the Court. We think that under section 18 of Act XL of 1858, an appeal is clearly given to any person injured by such an order of Court. The appellant here would certainly be injured by that order, and we think that as she was a party to the proceedings below, she is entitled to appeal. Upon her appeal we over-rule the order of the Court below, and declare that the petitioner, Mussamut Nazirun, was not entitled to a certificate, which we direct must be cancelled. Under the circumstances each party will bear her own costs in this Court.

[CIVIL APPELLATE JURISDICTION.]

March 24th. KIAM ALI (JUDGMENT-DEBTOR) . . . . . APPELLANT;  
 No. 284 of 1879. AND  
 KAYAMADDI (DECREE-HOLDER) . . . . . RESPONDENT.

*Contract Act (IX of 1872), section 44—Release of one of several judgment-debtors jointly liable for amount decreed.*

Having regard to section 44 of the Contract Act, a release of one of two judgment-debtors who are made jointly liable for the amount of the decree does not discharge the other from liability.

**A**PPEAL from an order passed by the Subordinate Judge of East Burdwan.

The respondent in this case having obtained a decree for costs against Kiam Ali, the appellant, and Tabarakoolla jointly, released the latter from his liability under the decree. Subsequently he applied for execution against Kiam Ali, for a moiety of the amount decreed.

The Subordinate Judge, to whom the application was preferred, made the following order, disallowing an objection that execution could not issue against one of the joint decree-holders:—

“The decree for costs was jointly against Tabarakoolla and Kiam Ali. The decree-holder has taken out execution from

moiety of the amount against Kiam Ali. It is optional with the decree-holder to proceed against either of the joint-debtors."

Against this order Kiam Ali preferred this appeal.

Baboo Booddo Nath Dutt, for the Appellant.

Baba Umbica Churn Bose, and Baboo Annundro Nath Chatterjee, for the Respondent.

1880  
KIAM ALI  
v.  
KAYAMADDI.  
Judgment.

The judgment of the Court (1), which was as follows, was delivered by

WHITE, J. :—

WHITE, J.

The only arguable point taken here against the order of the Subordinate Judge is, that the release of one of the defendants, who under the decree was jointly liable with another defendant, for the sum of Rs. 696 as costs, operates as a release of that other defendant.

The facts of the case are these :—A decree was passed in 1878, which, amongst other things, directed that Tabarakoolla and Kiam Ali should jointly pay Rs. 696 as costs. Against that decree Tabarakoolla alone appealed. That appeal was compromised, and in the compromise it was stated that the respondent had given up his claim against the appellant for the costs decreed in his favor by the Court below, and also his claim against the appellant in respect of his share of the mesne profits.

If the case had been governed by the English law, it is probable that a release in that general form would have operated to discharge the co-defendant, inasmuch as it is extremely doubtful whether the agreement of compromise could be construed as reserving the right of the judgment-creditor to proceed against the co-defendant, who was not released (see *North vs. Wakefield*, 13 Q. B., 441.) But the question before us must be determined by the Contract Act, section 44, which says that, "when two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors." That section has been the subject of a judicial opinion by Mr. Justice WILSON in *Kirtee Chunder Mitter vs.*

• (1) WHITE and MACLEAN, J.J.

1880  
KIAM ALI  
v.  
KAYAMADDI.  
—  
Judgment.  
—  
WHITE, J.

*Struthers*, reported in 3 C. L. R., 546. That was a case almost precisely similar to the present one. A suit had been brought against certain partners, and one of them, on paying a sum of money, was released from all claims upon him as an individual and as a partner in the late firm of Borradaile, Schiller and Co. As against him the suit was withdrawn.

The Court in that case held that section 44 of the Contract Act was applicable, and that the release operated only in favour of the party to whom it was given, and that did not otherwise affect the liability of the co-debtors. We have no hesitation, therefore, in saying that in this case the release had the limited operation which is contended for by the judgment-creditor.

We think that he was quite competent to proceed against Kiam Ali for the recovery of that portion of the costs in his decree which was not affected by the release. His application for execution, in which he stated that he released Tabarakoola was in fact a waiver as against him of all the costs except those which were sought to be recovered in the execution against Kiam Ali.

The appeal must, therefore, be dismissed with costs.

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## [CIVIL APPELLATE JURISDICTION.]

KALI MUNDUL AND OTHERS (DEFENDANTS) . . . . . } APPELLANTS;

AND

KADAR NATH CHUCKERBUTTY AND ANOTHER (PLAINTIFFS) . . . . . } RESPONDENTS.

1880  
March 31st.

No. 236-246  
of 1879.

*Res judicata—Execution of former decree, Order made in.*

Certain lands having been divided under a butwara between A and B, who together took one portion, and C who took the remainder, A, in 1847, mortgaged his share to B under a usufructuary mortgage. In 1851 a dispute arose as to the boundaries under the butwara, and ended in C surrendering 51½ beegahs, which B was allowed to take possession of under an ekrarnamah executed by A, to secure the costs incurred by B in the dispute.\*

In 1874 A sued to recover possession of a moiety of the lands held jointly by him with B, and in 1875 obtained a decree for possession and wasilat, no specific mention of the 51½ beegahs being made in the decree. In execution of the decree, wasilat in respect of a moiety of the 51½ beegahs was allowed, an objection by the defendant to such wasilat being charged having been overruled. In 1878, B sued to recover possession of the moiety of the 51½ beegahs, which had been taken by A under his decree.

*Held*, that in rejecting the objection raised by B, and allowing wasilat in respect of the 51½ beegahs, the Court had interpreted the decree passed, and declared that under it possession of a moiety of the 51½ beegahs had been decreed and given to A., and that the suit instituted in 1878 was therefore barred.

*Held*, also, that this matter having been decided under section 11, Act XXIII of 1861, between the parties in execution of a decree could not be made the subject of a suit.

**APPEAL** from a decision passed by the First Subordinate Judge of Bhaugulpore, affirming the decree of the Moonsiff of that District.

The facts appear from the judgment of the High Court.

Baboo Mohiny Mohun Roy, and Baboo Tarack Nath Dutt, for the Appellants.

Mr. M. L. Sandel, for the Respondents.

1880  
 KALI  
 MUNDUL  
 v.  
 KADAR NATH  
 CHUCKER-  
 BUTTY.  
*Judgment.*  
 PRINSEP, J.

The judgment of the High Court (1), which was as follows, was delivered by

PRINSEP, J. :—

The original properties of the estate whereof the land now in dispute forms a part were the Chuckerbuttys and Bhattacharjees on the one hand, and Sat Narain Singh on the other. A butwara was made under which the shares were divided, Sat Narain being made the proprietor of the southern, and the Bhattacharjees and Chuckerbuttys proprietors of the northern puttee.

In 1847 the Bhattacharjees mortgaged their share in the northern puttee to the Chuckerbuttys. In 1851 a boundary dispute arose between the original proprietors, the result of which was that Sat Narain Singh surrendered 51½ beegahs, receiving in return a small portion of land from the northern puttee. It appears that the Chuckerbuttys who bore the brunt of the dispute with Sat Narain Singh, and were really more interested than the Bhattacharjees, inasmuch as they were themselves in possession of the Bhattacharjees' share as mortgagees, sought to recover from the Bhattacharjees the costs which they had incurred, and in January 1858 an ekrarnamah was executed under which the Chuckerbuttys took possession of the entire 51½ beegahs.

In 1874 the Bhattacharjees sued the Chuckerbuttys to recover possession of their half share of this puttee, alleging that their debts had been paid off by the usufruct, while it had been held by the Chuckerbuttys, and they obtained a decree for possession and wasilat. The decree was executed and possession given on the 3rd of August, 1875. They proceeded to execute the decree for wasilat, and obtained final orders in June 1876, that is, in 1283. The Chuckerbuttys objected, in the course of determination of the amount of wasilat, that they had been charged with wasilat of these 51½ beegahs which really formed no portion of the decree; but their objection was disallowed, and they were compelled to pay wasilat for that land. In Cheyt 1283 the rights and interests of the Chuckerbuttys were sold to the Roys. Two years later the present suits, eleven in number, were brought by

(1) PRINSEP and MACLEAN, J.J. •



the Chuckerbuttys to recover rent from the tenants of these 51½ beegahs. The tenants and the Bhuttacharjees made common cause against them, the tenants pleading that they had paid rent to the Bhuttacharjees, and the Bhuttacharjees maintaining that they had recovered possession of half of the 51½ beegahs, as forming part and parcel of the land decreed to them in 1874, and that the other half fell to the Roys who purchased the rights and interests of the Chuckerbuttys.

1880  
KALI  
MUNDUL  
v.  
KADAR NATH  
CHUCKER-  
BUTTY.  
—  
Judgment.  
—  
PRINSEP, J.

As the case has now been put before us, it is for us to decide whether the Chuckerbuttys are entitled to possession by receipt of rents from the ryots notwithstanding that decree, or whether the plea raised by the Bhuttacharjees of *res judicata* by reason of the decision in the suit of 1874, is not a bar to the present claim.

Both the lower Courts have decreed the plaintiffs' suits, holding that the suit of 1874 did not determine the rights of the parties.

In the suit of 1874, the Bhuttacharjees sought to recover possession of their half of the entire northern puttee, stating that it had been originally mortgaged in 1847, for debts which had been incurred, and that all those debts and other debts had been liquidated from the usufruct. The defendants in reply pleaded that the deed of 1847 conferred an absolute title by sale. The Bhuttacharjees met that objection by producing the ekrarnamah of 1858, and pointed to the recital in it which described them as being at the time proprietors of the northern puttee with the Chuckerbuttys. The decree which was passed simply awarded possession to the Bhuttacharjees of half of the property without making any special references to the ekrarnamah, or to the 51½ beegahs covered by it.

The question was, however, raised when it became necessary to determine the amount of wasilat due. The Chuckerbuttys then objected that wasilat should not be calculated on the 51½ beegahs, which was not the land covered by the decree, but this objection was overruled.

It appears to us that in rejecting the objection raised by the Chuckerbuttys, and allowing the Bhuttacharjees wasilat of these 51½ beegahs, the Court really interpreted the decree passed, and

1880  
 KALI  
 MUNDUL  
 v.  
 KADAR NATH  
 CHUCKER-  
 BUTTY.  
 —  
*Judgment*  
 —  
 PRINSEP, J.

declared that under it possession had been decreed and given to the Bhattacharjees of half of the entire puttee, to which they were entitled as co-sharers with the Chuckerbuttys. If the Chuckerbuttys relied on the ekrarnamah as conferring upon them a separate title, they were clearly bound in the suit of 1874 to raise that plea, and to meet the claim of the Bhattacharjees which was for the half share of the entire puttee including the 51½ beegahs.

We think that in the suit of 1874, the whole question of the title of the Bhattacharjees was raised and decided, and not merely as contended by the respondent's pleader, whether they were entitled to recover the property as it stood in 1847.

We also think that, even supposing that this were not so, the matter having been decided in the course of execution of the decree between the Bhattacharjees and Chuckerbuttys, it is not open to the latter to seek to re-open it in another suit. This has been repeatedly held by the High Court as the proper interpretation of section 11, Act XXIII of 1861.

Under these circumstances, we think that these suits ought to have been dismissed. We accordingly reverse the orders of both the lower Courts, and dismiss the suits with costs.

## [CRIMINAL APPELLATE JURISDICTION.]

ROSHAN DOSADH, JEWAN DOSADH, AND } APPELLANTS;  
 ETWARI DOSADH . . . . . }  
 AND  
 EMPRESS . . . . . RESPONDENT.

1880  
 Feby. 10th.  
 No. 795 of  
 1879.

*Misdirection—Evidence Act (I of 1872), section 54—Previous convictions.*

In a trial before a jury, where the accused was charged with being in possession of certain articles alleged to have been stolen, and which were found in his house, the complainant and another witness identified the articles as belonging to the former, but the accused claimed the property as his own. The Sessions Judge in charging the Jury said:—"The fact that he (the accused) has been twice imprisoned for theft is also not without its weight, and should be taken into consideration when deciding as to the reliability of the evidence of identification." *Held*, that this was a misdirection, as the evidence of the previous conviction to prove bad character was irrelevant and inadmissible.

*Per Curiam*:—The proper object of using previous convictions, except under special circumstances, is to determine the amount of punishment to be awarded, should the prisoner be convicted of the offence.

**A**PPEAL from a conviction and sentence passed by the Sessions Court of Patna on a trial held by Jury.

The facts are sufficiently set forth in the judgment of the High Court (1), which was as follows:—

We think that there must be a new trial in this case.

The three prisoners were charged under section 411 of the Indian Penal Code, with having dishonestly been in possession of certain articles claimed by the complainant as property stolen from his house. A Dohur and Pugree were found with the prisoner Roshan. The complainant and a friend identified these as the property of the former. Roshan, on the other hand, stated that they were his, but his statement was unsupported by any evidence. The Sessions Judge was quite correct in putting it to the Jury, "to say whether there is any reason to believe that (the complainant and his friend) have made any mistake," he was clearly wrong in adding, "the fact that he (Roshan) been twice imprisoned for theft is also not without its weight,

• (1) MORRIS and PRINSEP, J.J.

1880  
 ROSEAN  
 DODADH  
 v.  
 EMPRESS.  
 Judgment.

and should be taken by you into consideration when deciding as to the reliability of the evidence of identification." Section 54 of the Evidence Act, though it declares that "the fact that the accused person has been previously convicted of an offence is relevant," also declares "that the fact that he has a bad character is irrelevant," except under certain circumstances which do not exist in the present case. The evidence of the prisoner's previous convictions has been treated by the Sessions Judge as evidence of his character which he has told the Jury to consider in determining the value of his claim to the property found in his possession. In this respect the Sessions Judge has clearly misdirected the Jury, because this evidence was irrelevant and inadmissible. He should have merely pointed out to the Jury the conflicting claims to this property, and called upon them to determine which they believed, at the same time reminding them that the prisoner was entitled to the benefit of any reasonable doubt. We think that the prisoner Roshan has been prejudiced by this error, and that he ought to have a retrial. Except under very special circumstances, none of which arise here, the proper object of using previous convictions is to determine the amount of punishment to be awarded, should the prisoner be convicted of the offence charged.

As regards the other two appellants Etwari and Jewan, the only points for the consideration of the Jury were, whether the jewels, produced in Court, formed part of the property stolen from the complainant, and whether they were found in the houses of the prisoners, concealed, as described by the evidence to the house search. The prisoners denied their possession of those articles, and, therefore, it was most important that the Jury should be called upon to determine whether those articles were found in their possession. The Sessions Judge, however, has altogether omitted to direct the Jury to consider this point. His charge runs thus :—"The fact that they (the jewels) were found in the house concealed under and in a corn bin shortly after the occurrences is certainly of great weight. There is nothing to show the case was got up, or that the search was unfairly made." And again "the jewels had undoubtedly been concealed in a somewhat suspicious manner in the house of Etwari and Jewan. Yes."

will take all these circumstances into your careful consideration, and say whether there is any reason to doubt that the articles found are the property of the prosecutor. If they are, and, as has been clearly shown, they were found in prisoners' house shortly after they were stolen, you will be quite justified in finding the prisoners guilty."

We think that the case against these two prisoners has not been properly put before the Jury. The Sessions Judge has assumed facts, evidence of which he should have laid before the Jury in order that they might find whether the property was or was not discovered in the possession of the prisoners under very suspicious circumstances. We, therefore, direct that these two prisoners also be retried.

1880  
ROSHAN  
DOSADH  
v.  
EMPERESS.  
Judgment.

[ORIGINAL CIVIL JURISDICTION.]

PAYN . . . . . PLAINTIFF; April 29th.

AND

THE ADMINISTRATOR-GENERAL OF }  
BENGAL AND OTHERS . . . . . } DEFENDANTS.

*Letters Patent, section 13—Transfer of suit to High Court.*

Where all the parties and the witnesses to a suit, instituted in the Court of the Subordinate Judge of H, where the cause of action arose, resided in Calcutta, and it appeared that it would be cheaper to have the case tried in Calcutta, the High Court, on the consent of all the parties, save one, who did not oppose the application for transfer, directed the suit to be transferred to the High Court.

THIS was an application under section 13 of the Letters Patent, made on behalf of the defendant, the Administrator-General, to have the case removed from the Court of the Subordinate Judge at Hooghly to the High Court. All the parties, with the exception of the defendant, Braham, consented to the order being made. That defendant declined to interfere in any way.

The petition upon which the application was made alleged:—

That the above suit in which Thomas Payn, as Manager and on behalf of the Comptoir d'Escompte de Paris, is plaintiff, and your petitioner and others are defendants, was

1880  
 ~~~~~  
 PAYN  
 v.  
 THE  
 ADMINISTRATOR-  
 GENERAL  
 OF BENGAL.  
 ~~~~~  
 Statement.  
 ~~~~~

instituted in the Court of the Subordinate Judge of Hooghly, on the 28th day of February 1880.

2nd.—That your petitioner is informed and believes that neither the plaintiff nor any of the defendants reside or carry on business, or personally work for gain within the jurisdiction of the said Court of the Subordinate Judge of Hooghly, but that to the contrary they all reside in the Town of Calcutta, within the Original Civil Jurisdiction of this Honorable Court, but that the plaintiff's cause of action arose within the jurisdiction of the said Hooghly Court.

3rd.—That your petitioner is informed and believes that the matters in issue in this suit may involve important and difficult questions of English Law, and the construction of deeds of mortgage, assignments, and deeds of further charge, all drawn in the English form.

4th.—That your petitioner is informed and believes that the evidence required for proof of the said mortgage deeds, deed of assignment and deeds of further charge is to be obtained wholly from witnesses living in Calcutta within the Ordinary Original Civil Jurisdiction of this Honorable Court.

5th.—That your petitioner is informed and believes that the plaintiff, who alleges himself to be suing on behalf of a mortgagee in possession, is liable to account to your petitioner, and that the evidence necessary to have such account fully and satisfactorily taken, is wholly to be obtained from witnesses living in Calcutta, and within the Ordinary Original Jurisdiction of this Honorable Court.

6th.—That your petitioner is further informed and believes that the said account cannot be fully and satisfactorily taken by the said Court of the Subordinate Judge of Hooghly.

*O'Kinealy*, for the Petitioner.

*Hill*, for the Plaintiff.

*Jackson*, for the other Defendants who appeared.

*Hill* supported the application. He said that in addition to the grounds stated in the petition there was a further ground for the transfer being made, viz: that difficult questions of priority under the various mortgages might arise.

Mr. Justice WILSON ordered the transfer to be made, on the grounds that the parties and witnesses resided in Calcutta; that it would be cheaper to try the suit in Calcutta; and that all parties appearing on the motion desired the transfer.

His Lordship further directed the reasons of the transfer to be recorded.

1880

## [CIVIL APPELLATE JURISDICTION.]

RAM SAHAI SINGH AND OTHERS (PLAIN- } PETITIONERS.  
TIFFS) . . . . .

Feb'y. 18th.

No. 954 of  
1879.

AND

MANIRAM AND OTHERS . . . . .

*Præcipe—Petition to sue in formâ pauperis—Court Fee Stamps, Payment of, in order to turn petition into plaint—Petition to sue in formâ pauperis, whether it may be turned into a plaint after rejection.*

The petitioners, on the 5th October 1877, applied to the Subordinate Judge for leave to sue in *formâ pauperis*, but their application was dismissed on the ground of limitation, the question of pauperism not having been enquired into.

The order dismissing the petition was subsequently, on an application under section 15 of the Charter, set aside by the High Court, which directed the Subordinate Judge to make an enquiry as to whether the petitioners were entitled to sue in *formâ pauperis*.

The Subordinate Judge made the enquiry, and, on the 17th June 1879, stated that he rejected the application to sue in *formâ pauperis*, but that he would give a written judgment. This he did on the 29th June, but meanwhile, on the 22nd June, the petitioners offered to pay the Court Fee Stamps if time were allowed, in order that their petition might be turned into a plaint, but their offer was refused on the ground that further proceedings must be by fresh suit.

*Held*, that assuming that the petition of 5th May 1877, which had never been accepted, could be considered as a subsisting proceeding which might on the authority of *Skinner's* case, 4 C. L. R., 331, (S.C.) L. R. 6 I. A., 126, be treated as a plaint filed on the 5th June 1877, it was imperative on the petitioners to have not only offered, but to have been ready to pay the Court Fee Stamps.

**RULE** calling upon the defendants to show cause why, on payment of the proper Court Fees within a time to be fixed by the Court, the application of the plaintiffs to sue in *formâ pauperis*

1880  
 RAM SAHAI  
 SINGH  
 v.  
 MAJIBAM.  
 Statement.

in the Court of the Subordinate Judge of Patna, should not be treated as a plaint filed on the 5th October 1877.

The circumstances under which the rule was obtained were as follows :—

On the 5th October 1877 the plaintiffs made an application to sue the defendants in the Court of the Subordinate Judge of Patna *in formā pauperis*.

The Subordinate Judge, without having enquired into the fact of pauperism, dismissed the application, on the ground that the claim was barred by limitation.

From this order dismissing the application the plaintiff applied to be allowed to appeal *in formā pauperis* to the High Court; but this application was rejected on the 8th April 1878 and an order was made granting leave to appeal on payment of Court fees within thirty days from that date.

The plaintiffs thereupon abandoned so much of their claim as was for the recovery of past mesne profits (the suit being for the recovery of immoveable property with mesne profits), and paid the Court Fees upon the valuation of the relief then claimed.

On the 19th August 1878, the High Court ordered the appeal to be taken off the file, and, under section 15 of the Charter, directed the Subordinate Judge to take up the application to sue as a pauper, and deal with it in accordance with the provisions of section 407 of the Civil Procedure Code (Act X of 1877.)

The Subordinate Judge accordingly took up the case, and, on the 17th June 1879, intimated his intention of rejecting the application to sue *in formā pauperis*, but said he would give a written judgment. Before the Subordinate Judge delivered his written judgment, the plaintiffs made a verbal offer to pay, if time were given, the Court Fee Stamps upon their petition in order that it might be treated as a plaint.

On the 29th June 1878 the written judgment rejecting the application was delivered.

The plaintiffs thereupon applied for and obtained the rule, which now came on for hearing.

Branson, and Mr. M. L. Sandel, for the Plaintiffs.

Paul (Advocate-General), Moonshee Mahomed Yusoof, Mr. G.



*Gregory, and Baboo Saligram Singh*, showed cause against the rule.

1880

RAM SAHAI  
SINGH

v.

MANIPAL.

Judgment.

The judgment of the High Court (1), which was as follows, was delivered by

PONTIFEX, J. :—

PONTIFEX, J.

The rule that has been argued before us discloses rather a peculiar state of circumstances. The applicants, in October 1877, applied to the Subordinate Judge of Patna for permission to sue as paupers. On the 28th February 1878 he rejected that application on the ground that he was bound to do so, as in his opinion, according to the plaintiffs' own petition, they were barred by limitation. Against that order the applicants made an appeal to this Court; but, on the 19th August 1878, this Court, considering the matter not properly a matter for appeal, dealt with it as follows by way of revision, holding that at that stage the application could not be rejected on the score of limitation applying. They said, that as the applicants had paid the stamp fees on the appeal on the principle of having given up their claim for mesne profits, they might apply to the Court below again to admit their application as paupers, if the mesne profits were excluded from their petition. Thereupon the applicants again applied to the lower Court to admit their petition as a pauper plaint.

On the 7th June 1879, after witnesses as to pauperism had been examined, the lower Court rejected that application to sue as paupers. It was in consequence of the order made on that application that the applicants came again to this Court and obtained the following rule:—"That the defendants should show cause why, on payment of the proper Court fees within a time to be fixed by the Court, the petitioner's application in the Court below should not be treated as a plaint filed on the 4th of October 1877.

It appears that after the evidence had been taken and the arguments concluded in the case before the Subordinate Judge the second application to be admitted as paupers, he, on the

\* (1) PONTIFEX and McDONELL, J.J.

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 Judgment.  
 PORTER, J.

17th June, intimated to the parties that he rejected the application, but that he would give a written judgment. Before delivering his written judgment either on the 21st or 22nd of June, the applicants made an oral offer to the Subordinate Judge to pay the Court Fee Stamps upon their petition in order to turn it into a plaint.

The learned Judge on the 29th June delivered a written judgment, and in that judgment, after deciding that the petition could not be accepted as a pauper plaint, he stated that an offer had been made by the petitioners to pay in the Court Fee Stamps if time were allowed them. He then goes on to state that he was sorry that he was obliged to reject that application; because, according to his view of the law, the original pauper application being rejected, any further proceeding must be by way of a fresh suit.

At that time Skinner's case, 4 C. L. R., 331, which has been lately decided by the Privy Council, had not come out to this country. At any rate it does not appear that it was brought to the learned Judge's attention.

Before us it is argued on the authority of Skinner's case, that it was the duty of the Subordinate Judge, upon the offer to pay the Court Fee Stamps, to treat the petition as a plaint filed in October 1877, for the purposes of limitation.

The rule was granted by this Court under section 622 of the Civil Procedure Code, and the question now before us is, whether we can interfere on the ground that the Subordinate Judge has, in his decision, exercised a jurisdiction not vested in him by law, or failed to exercise a jurisdiction so vested, or has committed some material irregularity.

Now no doubt we are bound by the decision of this Court on the first application, even if we were inclined to think that the Subordinate Judge could dismiss the petition of pauperism on the ground of limitation only. Whatever may be our opinion on that question, it is not open to us to go behind that decision. But we think that it was a question of very great doubt whether this petition of pauperism, which had never been accepted, and which, on the 17th June 1879, the Subordinate Judge had verbally stated that he had rejected, and which only awaited the

written judgment for its absolute rejection, could be considered as a subsisting proceeding which could be treated as a plaint filed on the 5th October 1877, even though the applicants on the 21st June offered to make immediate payment of the Court fees. And we also think that even if it could be so treated, it was imperative on the applicants to show, not only that they offered to pay the Court Fee Stamps, but also that they had them ready in Court to put in.

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v.  
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Judgment.  
PONTIPEX, J.

We observe, however, that the applicants have not produced any affidavit, stating that they were ready in Court with the Court fees on the day that they made that application; and we think that unless that offer was made, and the Court fees actually ready to be tendered, that it was not in the power of the Court to allow time for the purpose of obtaining and providing the money, and that under the circumstances the lower Court was right in rejecting the application, though this was not the specific ground given for its rejection.

At all events we think that this is not a case in which we ought to interfere under section 622 of the Code.

We must, therefore, discharge the rule with costs.

## [CIVIL REFERENCE.]

1880  
May 7th.  
No. 8 of 1880. **IN THE MATTER OF MONOHUR MOOKERJEE . PETITIONER.**  
*Executor by implication—Succession Act, X of 1865, section 182—Jurisdiction of High Court under section 264 of the Succession Act.*

A testator by his will directed A to remain in possession of his whole estate for nine years, and at the expiry of that period to distribute the estate among certain legatees in a manner prescribed. He also directed that A should, during the nine years, discharge all debts and receive all assets due to the estate.

*Held*, following the case of *In the Goods of Baylis*, L. R., 1 P. and M., 21, that A was an executor, and as such entitled to probate of the will.

Where a District Judge erroneously referred a matter relating to probate, under section 617 of the Code of Civil Procedure, the High Court, acting under the concurrent jurisdiction accorded to it by section 264 of the Succession Act, treated the matter as if originally brought before it.

**T**HIS was a reference submitted, under section 617 of the Code of Civil Procedure, by the District Judge of Hooghly for the opinion of the High Court.

The terms of the references, as stated by the District Judge, were as follows:—

“An application was made to this Court under the Hindu Wills Act, 1870, by one Monohur Mookerjee, styling himself executor under the will, for probate of the will of one Rajkishen Mookerjee, deceased. The application is unopposed, and the will has been proved in common form. The point on which I entertain doubt is whether, as maintained by the petitioner, he is appointed executor by implication, and as such entitled to probate, or whether he is only entitled to letters of administration with copy of the will annexed.

There is no express appointment in the will of the petitioner, or of any other person as executor, but it is contended for the petitioner that duties are imposed on him by the terms of the will, and in such language, as according to the cases decided under English Law, constitute him an executor, according to the

tenor. Stated shortly, the petitioner's duties, as defined by the will, are to remain in possession of the whole estate during a period of nine years, at the expiry of which term he is to make distribution of it to the various legatees (he is himself one) in the manner directed, and is moreover directed within that term to discharge all debts, and to receive all assets due to the estate of the testator.

My doubts arise there. According to section 182 of the Succession Act and its illustrations, it would appear that a necessary implication of appointment of any person as executor can only be in cases where an express appointment of some other person as executor has been made by the testator. The further illustrations given in Mr. Stoke's Commentary on this section support this view; for I assume (being unable to verify the matter here) that in the case of *Martha Manly*, 3 Sw. and Tr., 56, there quoted, an express appointment had been made. Moreover, even if it be held that in an ordinary case the terms of appointment here used, would be sufficient to constitute the petitioner executor of the will, the circumstances of the present case come within the rules laid down in the following cases:—*In the Goods of Jones*, 2 Sw. and Tr., 155; *In the Goods of Toovey*, 3 Sw. and Tr., 562, where it was held that the party was not an executor according to the tenor. I am thus inclined to hold that only letters of administration can issue.

The matter is important to the petitioner as involving the question, whether or not he is to be required to execute an administration bond with a surety or sureties, the estate being a very large one."

*Paul* (Advocate-General), for the petitioner, pointed out that the District Judge had no power to make the reference under section 617 of the Civil Procedure Code; but that the High Court, inasmuch as it had under section 264 of the Succession Act concurrent jurisdiction with the District Court, might now deal with the matter. He contended that the case was governed by *In the Goods of Baylis*, L. R., 1 Prob. and M., 21. There a testator, after directing the payment of all his debts, funeral and testamentary expenses, appointed certain persons trustees to

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In re  
MONOHUR  
MOOKERJEE.  
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 In re  
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 MOOKERJEE.  
 Judgment.

convert into money, get in and receive his personal estate as they should deem expedient, and to divide the money produced among his children; and it was held by WILDE, J., that the trustees so appointed were executors according to the tenor. The case was distinguished by Wilde, J., from *In the Goods of Jones*, 2 Sw and Tr., 155. The case of *In the Goods of Toomy*, 3 Sw. and Tr 562, was also clearly distinguishable.

The judgment of the High Court (1) was as follows:—

This reference was not properly made by the District Judge. It is not a case in which section 617 authorised a reference to the High Court, as the Judge's order, if made, would not be final, but the learned Advocate-General has asked the Court to take this case up as a Court of concurrent jurisdiction, and under the circumstances we have consented to do so. The point appears to us to be clear enough. The clauses of the will, which have been read to us, indicate without doubt that Monohur Mookerjee is a person who, to use the words of WILDE, J., in *In the Goods of Baylis*, L. R., 1 P. and M., 21, was authorised "to receive and pay the debts of the testator, and to get in the estate," and he has been given full powers for that purpose to collect and receive all debts, and manage the estate for the period of nine years, after the expiry of which he is to distribute it to the various legatees in the manner directed. We think he is entitled to probate.

(1) JACKSON and TOTTENHAM, J.J.

## [CIVIL APPELLATE JURISDICTION.]

MADHUB LAL KHAN . . . . . APPELLANT ;

AND

NOYAN GHOSE . . . . . RESPONDENT.

1880  
April 8th.No. 171 of  
1879.*Practice—Interest, Rate of, not specified in Decree—Execution.*

Where a decree was given for a certain amount with interest, the rate not being specified, the High Court considered itself bound by the authorities to affirm an order made by the Court executing the decree, allowing the Court rate usual at the time of the making of the decree.

**A**PPEAL from an order passed by the District Judge of Midnapore, modifying an order passed by the Moonsiff of Ghatal.

The circumstances appear from the judgments of the High Court.

**Baboo Rask Behary Ghose**, for Appellant.

No one appeared for the Respondent.

The following judgments were delivered by the High Court (1), which was as follows :—

**MACLEAN, J.** :—

**MACLEAN, J.**

This is an appeal against an order of the District Judge of Midnapore, modifying the order of the Moonsiff of that district, passed in execution of a decree. The point upon which the Moonsiff's order was modified was, that whereas in the decree interest was given without specifying any rate, the Moonsiff allowed twelve per cent. interest. The District Judge held that, as the decree was silent as to the rate of interest, it was incapable of execution, since, in the execution proceedings, the decree cannot be extended or explained. If I had not been bound by the decisions of this Court in similar cases, I would probably have been very glad to affirm the order of the District Judge, inasmuch as a decree which does not

• (1) WHITE and MACLEAN, J.J.

1880  
 MADHUB LAL  
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 Judgment.  
 MACLEAN, J.

specify the rate of interest is obviously an imperfect decree, and the party, in whose favor it was made, could have had it amended. But I think that the District Judge should not have disturbed the order of the Moonsiff regarding the rate of interest. It does not appear that anything was urged before the Moonsiff on this point and there are authorities for granting the *usual* rate of interest viz., 12 per cent., when the decree is silent as to the rate.

In the case of *Mussamut Soobodra Bebee vs. Sheo Churn Lal* 7 W. R., 375, Mr. Justice MACPHERSON, in delivering the judgment of the Court, says:—"As the decree does not specify the rate of interest, we think the Court ought to have allowed interest at 12 per cent., the usual Court rate, and that it was wrong to allow a higher rate." In *Syud Shah Abdullah vs. Meer Reas Hossein*, 17 W. R., 414, the usual rate prevailing at the date of the decree was allowed. In *Broughton vs. Rajah Suhb Perla Sein*, 19 W. R., 152, the claim was decreed with usual costs and interest, and though there seems to have been a doubt in the mind of Mr. Justice PHEAR, whether the word "usual" was to be taken as coupled with the word "interest," he ultimately held that it was to be so taken. The same learned Judge in an earlier decision in 19 W. R., 47—*Rajah Rughoonundun Singh vs. Arcott*, declined to disturb an order allowing interest at a particular rate, although the decree was silent as to rate.

I have not found any case in which interest was absolutely refused on the ground that the rate was not mentioned in the decree, and the preponderance of authority is in favor of the usual rate in such cases.

The appeal will be allowed, the order of the Judge set aside and that of the Moonsiff restored with costs.

WHITE, J. WHITE, J. :—

I concur.

But for the authorities cited by my brother MACLEAN I should have been inclined to the opinion that when a decree simply mentions that a certain amount is decreed with interest, but omits to state the rate of interest, the Court, executing the decree, is not at liberty to fix a rate, but can only execute the decree for the amount of principal money awarded. Such a decree would



appear to be imperfect and incomplete, and I should have thought that the duty was thrown upon the judgment-creditor who obtained it to apply to the Court at the proper time to correct the omission; and that having failed to do so, he ought to suffer the consequences.

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MADHUB LAL  
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v.  
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GHOSH.

Taking it, however as I think, we must do upon the authorities, that the Court executing such a decree can fix the rate of interest, the proper rate to fix is the Court rate which prevailed at the date of the decree, namely, 12 per cent. per annum. The Court rate has, within the last few years, been reduced to 6 per cent. per annum. I much wish that in the present case the lower Court rate should be adopted, but I am unable to find any principle upon which that can be done.

*Judgment.*  
WHITE, J.

According to the authorities cited, the rate of interest, where a decree awards interest, but is silent as to the rate, must be the Court rate which prevailed at the time when the decree was passed. We must, therefore, reverse the Judge's order, and restore that of the Moonsiff, which awards interest at twelve per cent. per annum.

## [CIVIL APPELLATE JURISDICTION.]

1880  
January 27th.

No. 314 of  
1879.

BHOYRUB CHUNDER DOSS AND ANOTHER } APPELLANT  
(JUDGMENT-DEBTORS) . . . . . }

AND

WAJEDUNNISSA KHATOON (DECREE- } RESPONDENT  
HOLDER) . . . . . }

*Civil Procedure Code (Act X of 1877), section 622—Appeal—Jurisdiction—Costs, Execution of Decree for, where Decree-holder is not made to an appeal under which the whole decree is set aside.*

The lower Appellate Court having allowed an appeal with costs respondents in that Court preferred a second appeal to the High Court but did not make A, who was one of the successful parties in the Appellate Court, a party. The High Court reversed the decision of the lower Appellate Court. *Held*, that A was not bound by the decision of the High Court, and was entitled to execute the decree for costs obtained by her in the lower Court.

Where an appeal, preferred to the District Court against an order refusing an application for execution of a decree for costs, was allowed by the High Court, on a second appeal being instituted, *held* that no appeal lay either to the District Court or to the High Court, but enter the matter under section 622 of the Civil Procedure Code, and give the order of the District Court.

**A**PPEAL from a decision passed by the Officiating Judge of Furreedpore, reversing an order made by the Second Moonshi Goalundo.

The respondent in this case applied for execution of a decree for costs obtained by her in an appeal which was heard by the District Judge of Furreedpore. It appeared that a second appeal was preferred to the High Court, but that the present respondent was not made a party to that appeal. The High Court reversed the decision of the lower Appellate Court.

Under these circumstances, the Moonsiff, to whom the application was made, refused to allow execution on the ground that the decree, in which the costs were awarded, had been set aside.

An appeal was, thereupon, preferred to the District Judge, who reversed the order refusing the application, on the ground that as the present respondent had not been made a party to the High Court proceedings she was in no way bound thereby. He relied on the case of *Government vs. Lalji Sahu*, 1 B. L. R., Short Notes, XXIII.

A second appeal was, thereupon, preferred by the judgment-debtors, who alleged that the order of the District Judge, reversing the order of the Court of First Instance, was without jurisdiction, as there was no appeal allowed from such an order under the Code of Civil Procedure.

1880  
BHOYRUB  
CHUNDER  
DOSS  
v.  
WAJEDUN-  
NISSA  
KHATOON.  
Judgment.

*Baboo Shoshee Bhosun Dutt*, for the Appellants.

*Baboo Bhowany Churn Dutt*, for the Respondent.

The following judgment was delivered by the Court (1) :—

This was a case for execution of a decree.

The plaintiff brought a suit against certain persons, and that suit, after various hearings, was dismissed by the District Judge on appeal, but on further appeal to the High Court the plaintiff obtained a decree. The District Court had dismissed the suit with costs, and among the parties entitled to costs under that decree was the respondent before us, who was not originally a party to the suit, but had been placed on the record in substitution of certain other persons. This defendant was not made a party to the appeal to the High Court. She has availed herself of that circumstance to apply to the Court of the Moonsiff for execution of the decree of the lower Appellate Court, in so far as under it she was entitled to costs; and the Moonsiff held that she could not recover costs, inasmuch as the whole decree had been reversed by the High Court. In making that order the Moonsiff appears to have forgotten that, although one of the several persons affected by a decree may appeal and obtain a reversal of that decree for himself and other persons affected by it, it is not open to the appellant to make only one of the persons who obtained that decree respondents, and so obtain a reversal of that decree against all the persons who had

• (1) JACKSON and TOTTENHAM, J.J.

1880  
—  
BHOYET  
CHETDER  
DASS  
vs.  
WAJEDUN-  
NISSA  
KHATOON.  
—  
*Judgment.*  
—

obtained it. The Moonsiff's judgment, therefore, was wrong. The plaintiff affected by it appealed to the District Court, and the District Court reversed that judgment, on the ground, which is correct enough, that inasmuch as this lady Wajedunnissa was no part to the special appeal, she could not be deprived of her costs by decree obtained behind her back. Then it is objected before us to-day, that the District Judge in hearing this appeal acted without jurisdiction, inasmuch as no appeal was allowed by the appeal clause of section 588 of the Code of Civil Procedure. As to this it is contended on the other side that by section 102 of Act XI of 1879, the appeal was, so to say, validated. Section 102, however, will not apply, because there was no appeal pending at the time of the passing of the Act. The appeal to the Judge had been decided just before the Act was passed, and an appeal to this Court had not been presented. In fact this case comes before us under section 622, that is to say, it is a case in which no appeal lies to the High Court, but where the Court below has exercised jurisdiction not vested in it by law. That being so, we have to consider whether we ought to make any order. The concluding words of the section are, that the High Court may pass such order in the case as the Court thinks fit.

Now as the order of the Judge in this matter, although passed without jurisdiction, was really a right order, and had merely the effect of getting rid of the decision of the First Court, which was wrong, we think we ought not to make any order in this case. The appeal will, therefore, be dismissed. We make no order as to costs.

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## [CIVIL APPELLATE JURISDICTION.]

MOHINY MOHUN DASS CHOWDHRY } APPELLANT ;  
(PETITIONER) . . . . . }

AND

BHOOBUNJOY SHAH AND AN OTHER (AUC- } RESPONDENTS.  
TION-PURCHASERS) . . . . . }

1880  
April 2nd.

No. 271 of  
1879

*Execution of decree against one judgment-debtor pending appeal by another  
—Irregularity in execution sale—Proclamation.*

A decree having been obtained against A and B upon a mortgage, the latter appealed to the High Court, and subsequently, on the mortgaged properties being attached and advertised for sale, while the appeal was pending, applied for and obtained an order for stay of the sale as far as she was concerned. The sale, however, took place on the day originally fixed, but no fresh proclamation was issued, although it was announced previous to the sale that only A's rights and interests would be sold.

*Held*, that the sale was irregular, as a fresh proclamation ought to have been issued, and an enquiry instituted as to A's share in the property, and it having appeared that A was materially injured by such irregularity, the sale was set aside.

**A** PPEAL from an order passed by the Judge of Noakhally.

The facts will be found in the judgment of the High Court.

Baboo Chunder Madhub Ghose, and Baboo Kashi Kant Sen,  
for the Appellant.

Baboo Nil Madhub Bose, for the Respondents.

The judgment of the High Court (1) was as follows :—

A decree was obtained by Bhoobunjoy Shah and Ram Kanto Bhuya, on the 17th January 1878, on a mortgage said to have been executed by Mohiny Mohun Dass and Shona Kar. Shona Kar alone appealed against the decree, and it appears that the decree against Mohiny Mohun Dass was an *ex-parte* decree. The mortgaged properties were attached and advertised for sale on the 16th September 1878. Shona Kar then moved a Divi-

• (1) PRINSEP and MACLEAN, J.J.

1880  
 MOHINY  
 MOHUN DASS  
 CHOWDHRY  
 v.  
 BHOOBUNJOY  
 SHAH.

*Judgment.*

sion Bench of this High Court, to have the sale stayed so far as she was concerned in consequence of her appeal, and an order to this effect was passed. The sale, nevertheless, of the rights and interests of Mohiny Mohun Dass was held on the 16 September 1878 on the original proclamation, it being announced previous to the sale that Shona Kar's rights and interests would not be sold. Mohiny Mohun's rights and interests in thirteen out of the sixteen mortgaged properties were sold for Rs. 13,000 the purchasers being the mortgagees. Notwithstanding objection raised in the Court below the sale was confirmed, the District Judge holding that, although possibly there might have been some irregularity, yet it did not affect the sale inasmuch as the inadequacy of the price obtained was not proved.

It seems quite clear to us that the manner in which the sale was conducted was very irregular. When the District Judge obtained the order of this Court exempting the rights and interests of Shona Kar from sale, it was clearly his duty to issue a fresh sale proclamation, and to have made some inquiries as to the exact share held by the judgment-debtor Mohiny Mohun Dass, so as to enter it in that proclamation. But we think, further, that under the circumstances the Judge should have postponed the sale altogether, because it was impossible to expect a reasonable price to be bid when it was uncertain, in consequence of the appeal of Shona Kar, whether the whole decree might not be set aside.

As regards the question of adequacy of the price obtained at the sale, it seems from the evidence on the record that Mohiny Mohun's share was a 9 annas share, and Shona Kar's a 6 annas share, taking the 8 annas of the property as representing the whole. It seems that their share in the 16 properties were considered sufficient security for the mortgage debt, which would amount to Rs. 76,000, therefore it might reasonably be supposed the value of the 9 annas share held by Mohiny Mohun Dass in 13 out of 14 properties would be considerably above Rs. 13,000. Mohiny Mohun Dass himself was examined, and he has declared that in his opinion his share was worth Rs. 60,000 to 70,000. It is quite possible that better evidence might have been adduced on this point; but, as pointed out by appellant's pleader, the mortgagees

who were in possession of all the requisite information regarding the value of the property, never tendered themselves to contradict this statement of Mohiny Mohun Dass. In our opinion the price realized, Rs. 13,000, was not the value of the rights and interests of Mohiny Mohun Dass, which were then sold. It may be, as pointed out by the respondents' pleader, that the fact that the appeal of Shona Kar was pending might have had much influence on the purchasers. But we think that the fact that the sale was held on the original sale proclamation affords equal reason for supposing that that irregularity also had very material influence on the action of the purchasers. We have less hesitation in setting aside this sale because the mortgagees themselves purchased.

The appellant is entitled to his costs in this Court and in the lower Court.

1880  
 MOHINY  
 MOHUN DASS  
 CHOWDHREY  
 v.  
 BHOOBUNJOY  
 SHAH.  
 Judgment.

[CIVIL APPELLATE JURISDICTION.]

HUSSAN ALI (JUDGMENT-DEBTOR) . . . . APPELLANT;  
 AND  
 B. DONZELLE (DECREE-HOLDER) . . . . RESPONDENT.

March 15th.  
 No. 207 of  
 1879

*Practice—Act VIII (B.C.) of 1869, section 52—Limitation—Courts,  
 Closing of.*

In a suit under section 52 of Act VIII (B.C.) of 1869 a decree was obtained for arrears of rent on the 23rd September 1878. The Court was legally closed from the 26th September to the 28th of October, and on the day it opened, the defendant deposited in Court the amount of the decree with interest and costs, and asked to have execution stayed. *Held*, that the defendant was entitled under the above section to 15 clear days for making the payment, and that, under the circumstances, he was entitled to a stay of execution.

**A**PPEAL from an order passed by the District Judge of Bangalore, affirming an order of the Moonsiff of Muddeparah.

The facts sufficiently appear from the judgment of the High Court.

Baboo Omakali Mookerjee, for the Appellant.

No one appeared for the Respondent.

1880  
HUSSAN ALI  
 v.  
DONZELLE  
Judgment.

The judgment of the High Court (1), which was as follows, was delivered by

WHITE, J. :—

WHITE, J.

In this case, the appellant (who is the defendant in the first Court) was sued under section 52 of Act VIII (B.C.) of 1869 for the purpose of being ejected, and also for the recovery of certain arrears of rent.

On the 23rd September 1878, the first Court passed a decree for his ejectment, and, as directed by the section, the decree specified the amount of the arrears of rent due from the defendant.

The section further enacts that if the amount of the arrears together with interest and costs of suit, be paid into Court within fifteen days from the date of the decree, execution shall be stayed. The date of the decree was the 23rd of September 1878, and the Court closed on the 26th of that month for the Pooja Holidays, and did not open again till the 28th of October 1878. The defendant on that day appeared in Court, and deposited the amount of the arrears, together with interest and costs. Notwithstanding the deposit having been made the decree-holder applied to the Moonsiff to execute the decree by ejecting the defendant on the ground that the payment was not made in due time. The Moonsiff being of that opinion ordered execution to issue.

On appeal to the District Judge he upheld the Moonsiff's decision. He considered that it was a hard case, but that on the face of a certain Full Bench Ruling, which he refers to but does not cite, held that the Moonsiff's order must stand, and that he could not interfere. We have referred to the Full Bench Ruling which is reported in 2 W. R. (Act X Rulings) 21—*Poulson vs. Modhoosoodun Paul Chowdhry*, and we think that it has no application to the case now before us. The real question which we have to deal with is as to the construction which is to be put upon section 52 of Act VIII (B.C.) of 1869. It is to be observed that section 52 gives a ryot the power of staying execution of a decree for ejectment upon paying the amount of arrears decreed together

(1) WHITE and MACLEAN, J.J. •



with interest and costs of suit into Court, and allows him fifteen days for that purpose. We think that he is entitled to have a clear 15 days for making the payment. In the present case the decree was made only two days before the Court closed. To hold that he must make the payment within those two days, as the Courts below appear to think, is to deprive him of 13 of the days awarded him by the Legislature. When the 15th day arrived he could not possibly deposit the money because the Court was shut, and there was no officer to receive the money. The Court was legally closed for the Poojah Holidays. But the money was paid in by the defendant on the very first day the Court re-opened. We think that under these circumstances the defendant was entitled to a stay of execution. A case analogous to the present one was decided by Sir BARNES PEACOCK, Chief Justice, and Mr. Justice LOCH, which is reported in 8 W. R., 223 *Dabee Rawut vs. Heeramun Mahtoon*. It was a case under the Regulation relating to the foreclosure and redemption of mortgages which was construed by these Judges to give a mortgagee the option either of depositing the mortgage money and costs in Court within a year from the date of the notice of foreclosure or of tendering it to the mortgagee. The mortgagor in the decision cited chose to adopt the former course, namely, to deposit the money in Court. The 25th of November was the last day for depositing the money, but the Court was not open on that day, and he deposited it on the 28th, which was the first day of the re-opening of the Court. Those learned Judges held that the mortgagor had saved the estate from foreclosure by depositing the money on the first day, after the 25th November, on which the Court was open; and they came to this decision, although Sir BARNES PEACOCK doubted whether the Court had been legally closed. Our decision is also in accordance with the English authorities. In *Mayer vs. Harding*, L. R., 2 Q. B., 410, the appellant, who wished to appeal against an order of certain Justices of the Peace, and who was bound by a statute to lodge in the Queen's Bench the case signed by the Justices within five days after he had received it from them, got the case on Friday, when the Queen's Bench was closed, and lodged it the following Wednesday, when the Division Bench re-opened.

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HUSSAN ALI  
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Judgment.  
WHITE, J.

1880  
HUSSAN ALI  
 v.  
DONZELLE.  
Judgment.  
WHITE, J.

The Court held that as the offices were closed from Friday to the Wednesday, the appellant had transmitted the case as soon as it was possible to do so and had sufficiently complied with the requirements of the statute. In passing the decision the Court acted upon the rule that the law will not compel the doing of impossibilities.

We accordingly reverse the order of the lower Court, and direct that the defendant, if he has been ejected, which we are informed that he has been, should be restored to possession, and that the plaintiff should have liberty to take out of Court the money deposited by the defendant.

The appeal is allowed with costs. The defendant will have his costs in both the lower Courts.

[CIVIL APPELLATE JURISDICTION.]

February 4th. **SRIKANT BHUTTACHARJI AND OTHERS** } APPELLANTS;  
 No. 808 of (PLAINTIFFS). . . . . }  
 1879. AND  
**KEDARNATH MOOKERJEE AND ANOTHER** } RESPONDENTS.  
 (DEFENDANTS). . . . . }

*Julkur Rights, Restrictions upon.*

The owners of the bed of a river when dry are not entitled so to use that bed as to injure the julkur rights which others have in when full, by restricting the area over which the water may flow.

**A**PPEAL from a decision passed by the Judge of the 2—Pergunnahs, reversing the decree of the Moonsiff of Baraset.

The plaintiffs, who had a right of fishing on a river called the Ludy, alleged that the defendants had created a “koni” or fish pond in the bed of the river, and had thereby diminished the area over which they (the plaintiffs) had the right of fishing.

The defendant Kedarnath was the owner of the east side of the river, but the plaintiffs had no land on either side.

It appeared that in 1871 a similar suit had been brought against the second defendant, Jumeerooddy, who was the principal defendant's predecessor in title, to have an obstruction, which had been erected on the same spot, removed, and that in that

suit a decree (which was confirmed in appeal) for its removal was granted.

The Moonsiff held that the "koni" now in question was an obstruction to the river, which, by diminishing the area over which the water had been accustomed to flow, interfered with the plaintiffs' right, and he decreed that the "koni" should be removed.

The District Judge held the plaintiffs' rights were not such that they might prevent the defendant from dealing with the property as he had done. "The defendant," he said, "has the right of preventing the water from flowing over his land; at least there is nothing to show that the plaintiffs or their lessor can compel him to keep his land open to the flow of water over it; and I, therefore, hold that, even supposing what defendant has done to be detrimental to plaintiffs, the latter have no right of action against him."

He accordingly reversed the decision of the Moonsiff.

The plaintiffs appealed to the High Court.

Baboo *Hem Chunder Banerjee*, and Baboo *Gopal Chunder Sircar*, for the Appellant.

Baboo *Guru Dass Banerjee*, for the Respondent.

The judgment of the Court (1), which was as follows, was delivered by

JACKSON, J. :—

JACKSON, J.

We think the judgment of the lower Appellate Court is founded upon a misapprehension, both of the facts and of the plaintiffs' rights, as those rights ordinarily result from the possession of a right of julkur.

It appears that the plaintiffs have a right of julkur which, in this particular locality, arises from the flow of water at other times than in the dry season over a bed which, when dry, belongs to the defendants, the first defendant in this case being the representative in title of the second defendant, Jumeerooddy.

The plaintiffs' claim is that in that bed over which, when full with water, the plaintiffs have a julkur right, these defendants

(1) JACKSON and TOTTENHAM, J.J.

1880  
SRIKANT  
BHUTTA-  
CHAJI  
&  
KEDARNATH  
MOOKERJEE.  
—  
Judgment.  
—

1880

SRIKANT  
BHUTTA-  
CHARJI

v.

KEDARNATH  
MOOKERJEE.*Judgment.*

JACKSON, J.

have constructed what is called a "koni" which is, as I understand a reservoir in which fish are kept, and that they have enclosed it so that the fish intercepted there cannot escape, and that the width of the ordinary channel over which the plaintiffs' rights are exercised has been very much restricted, and their rights thereby interfered with. It appears that the plaintiffs formerly brought a suit against Jumeerooddy, the predecessor of the defendant No. 1, on the ground that he had just made such a "koni," and it seems at this very spot.

In that case, no doubt, there was an additional injury from the construction of a bund.

The Moonsiff in that case—and the judgment was afterward affirmed in appeal—held that every one of those "konis" and line of stakes or pallisades was, as I understand, a separate injury done to the plaintiffs, and he ordered the removal of the "koni." It appears to us that the defendant No. 1 is concluded by this judgment, both as to the rights of the plaintiffs and also as to himself not being entitled to make a "koni" at that particular place. It appears to us that the defendant would not be entitled although the bed of the river, when dry, might be his, so as to use that bed as to affect injuriously the julkur rights of the plaintiffs. We think, therefore, that the decree of the Moonsiff in this case was quite right, and that the Judge's decision reversing that decree was erroneous, and must be set aside, and the judgment of the Moonsiff restored with costs.

## [CRIMINAL REVISIONAL JURISDICTION.]

IN THE MATTER OF A. DAVID, *Petitioner.**Criminal Procedure Code (Act X of 1872), sections 295, 296—Reference to High Court.*1880.  
April 17th.  
No. 1222 of  
1879.

One of two prisoners, who were tried jointly before a Bench of Magistrates on the complaint of the District Magistrate, appealed to the Sessions Judge, and was acquitted. The District Magistrate thereupon, under sections 296 and 297 of the Criminal Procedure Code, transmitted the proceedings in the case to the High Court, and asked that they might be quashed on the ground that there had been a failure of justice.

*Held*, that the Magistrate was not competent to refer the proceedings of a superior Court to the High Court.

**T**HIS was a reference submitted by the Officiating Magistrate of Malda, under sections 296 and 297 of the Code of Criminal Procedure, for the opinion of the High Court.

The proceedings in the earlier stages of this case have already been reported in 5 C. L. R., p. 574—In the matter of *A. David*.

There the High Court, on the 22nd February, cancelled an order made by the Sessions Judge of Rajshahye, directing certain evidence to be taken by the Bench of Magistrates which had originally tried the case, and ordered him to decide the appeal upon the evidence as it stood upon the record.

The result was, that on consideration of that evidence, the Sessions Judge acquitted the prisoner.

The Magistrate, whose property it was which had been stolen, and which was alleged to have been received by A. David with a guilty knowledge, thereupon referred the entire proceedings to the High Court with the following remarks :—

“It appears that two material errors have crept into the decision of this case, which have vitiated the whole proceedings, and thereby caused the failure of justice. One is an error in law, and the other is an error in the procedure. Both the Courts (the Bench as well as the Appellate Court) have not taken into their consideration the confession of the co-prisoner Moula

1880

*In re*  
DAVID.*Statement.*

Buksh which, according to the opinion of the District Judge, as far as it can be inferred from his second judgment on appeal in this case, would have turned the scale against A. David, the co-prisoner. Both the Courts are of opinion that, though the prisoners Moula Buksh and A. David had been tried jointly under sections 381 and 408, Penal Code, but convicted on different offences, viz., one under section 408, and the other under section 411, Indian Penal Code, the confession of the former cannot be taken into consideration as against the other under section 30 of Act I of 1872. But in this both the Courts appear to be in error. It is to be seen from the record in this case that the prisoners Moula Buksh and A. David had been sent up for trial by the Police, charged under section 381 and 408 and Kristo under section 414, Penal Code, and were being tried together jointly for the same offence. They were tried jointly, the third accused Kristo was discharged, and the two other accused Moula Buksh and A. David were convicted under sections 408 and 411 respectively.

In case the High Court is of opinion that, though they were tried jointly, but as they were charged separately with different offences in the course of the trial, in this case section 30 of Act I of 1872, does not apply, then there is another error which the District Judge adverts to in his second judgment, viz., that the Court of First Instance was wrong in trying the thief (Moula Buksh) and the receiver of stolen property (A. David) jointly.

If this view is correct, then this error in the procedure has caused a failure of justice. From what is seen in the record, Moula Buksh would, in that case, have been a competent witness against A. David, had he been tried separately and convicted on his own confession, and then examined as a witness for the prosecution in the case against A. David.

If this view is correct, then owing to this irregularity in the procedure by trying all the three prisoners guilty of different offences jointly, the ends of justice have been defeated, and the proceedings should, it seems, be quashed, and a new trial directed.

Further, the District Judge has set aside this conviction on the ground also that the prosecution has failed to prove that there was any guilty knowledge on the part of the prisoner A. David

in receiving the goods as proved, which receipt, the accused A. David denied, whereas upon the facts and probabilities of the case the Appellate Court ought to have inferred that there was guilty knowledge on the part of the prisoner A. David, as the established facts and probabilities under the circumstances warrant this legal presumption, there being no room for any other presumption from the established facts."

1880  
 In re  
 DAVID.  
 Judgment.

Mr. S. J. Leslie, and Baboo Womesh Chunder Banerjee, appeared for A. David.

The judgment of the High Court (1) was as follows:—

On the prosecution of a chuprasee in the service of Mr. Porch, Magistrate of Pubna, one Moula Buksh, his khansama, was convicted by a Bench of Magistrates under section 408, Penal Code, of criminal breach of trust.

In the same trial one David was tried and convicted of dishonestly receiving certain bottles stolen by Moula Buksh. The trial of these two men together was perfectly legal under section 458, Code of Criminal Procedure.

David alone appealed to the Sessions Judge, who found that except the statement of Moula Buksh, which was not admissible, under section 30 of the Evidence Act, because he and David were not tried jointly for the same offence, there was nothing to prove guilty knowledge against David. The Sessions Judge, however, considered that he might require the evidence of Moula Buksh to be recorded under section 282 of the Code of Criminal Procedure, and sent the case to the Bench of Magistrates that this might be done. The matter was brought before a Division Bench of this Court, which held that this order was contrary to law, and directed the Sessions Judge to proceed to try the appeal on the record. David was accordingly acquitted.

Mr. Porch, who is the real complainant in this case, and who also holds the office of District Magistrate, has sent up the entire proceedings in this case both before the Bench of Magistrates and the Appellate Court of the Sessions Judge, and has asked for an order quashing the entire proceedings, and directing a new trial

(1) PRINSEP and TOTTENHAM, J.J.

1880  
 ~~~~~  
*In re*  
 DAVID.  
 ~~~~~  
*Judgment.*  
 ~~~~~

"as there appears to have been a failure of justice" on the ground set forth in a memorandum prepared by him.

In the first place we are of opinion that the District Magistrate was not competent to refer this case to us. Section 295 of the Code of Criminal Procedure authorizes him to call for and examine the record of any Court subordinate to him. In the matter now before us the District Magistrate criticises the judgment of the Sessions Court, the Court of Appeal to which he, as a judicial officer, is subordinate, and he desires to have the order of acquittal passed by that Court set aside, as well as the proceeding in the trial of Moula Buksh, who was convicted by the Bench Magistrates.

We should at any time regret that a District Magistrate should assume such a position towards the Sessions Judge of his District, and in the present case we regret the action of the Magistrate, the more that he was himself personally interested in the case as real prosecutor.

We must observe that it has been a rule laid down by this Court in several cases that as a Court of Revision it will not interfere in any case of acquittal, the law having given to Government the right of appeal in such cases. The object of the reference is to secure the conviction of David more than to have a retrial of Moula Buksh, who has not questioned the propriety of the conviction or sentence passed by the Bench of Magistrates.

We consequently decline to interfere in the case, and we may add that we do not accept the view of the law enunciated by the District Magistrate.

After we had fully considered the case, and had determined the nature of the order which should be passed, we learnt that the Government pleader wished to appear in this case to support the reference made by the District Magistrate, and that David was also represented by an attorney of this Court, but we do not think it necessary to hear any one in this matter.



## [PRIVY COUNCIL.]

WISE AND OTHERS . . . . . 1879  
AND Dec. 19th.

AMEERUNNISSA KHATOON . . . . .

WISE AND OTHERS . . . . .  
AND

COLLECTOR OF BACKERGUNGE AND OTHERS . . . . .

*Chur lands—Prescription.*

Independently of the title of Government to lands which have been originally formed as an island in the bed of a river, possession for three years under an order of a Magistrate in a proceeding under Act IV. of 1840 does not create a title by prescription.

[Judgment of High Court affirmed.]

**A**PPEAL from a decision passed by a Divisional Bench (JACKSON and McDONELL, J.J.) of the High Court at Calcutta, on the 14th September 1875.

The facts will be found in the judgment of the lower Court, which is reported in 24 W. R., 435—*Ameeroonissa Khatoon vs. Wise*.

*Leith, Q.C.*, and *Doyne*, for the Appellants.

The Respondents, did not appear.

The judgment of the Judicial Committee (1) of the Privy Council was as follows :—

This is a suit brought by Mr. J. P. Wise and other persons of the name of Bysack, against several defendants ; first, the Government, represented by the Collector of Backergunge ; secondly, Ameeroonissa Khatoon ; and, thirdly, Krishna Chunder Chatterjee, for himself and as guardian of the widows of Bykunt Chunder Chatterjee. Certain other persons, as the representatives of Moulvie Wahed Ali and of Moulvie Abdool Ali were

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 WISE  
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 NISSA  
 KHATOON.  
 Judgment.

afterwards, on the application of the plaintiffs, added as defendants on the record.

The suit relates to certain plots of land, B, C, D, E, and marked in an Amin's plan made previously to a settlement 1868. The plaintiffs claim 10 annas of B and C, the whole of D, and the whole of E and F. They allege that the plots B, C, and D, were re-formations of lands which belonged to them, and that E and F are accretions to D, or to B, C, and D. They also contend that, even if they failed to establish this title they had, under the circumstances to be hereafter stated, obtained a title to what they claim in this suit by prescription. The case was tried before the Judge of Backergunge, and it was found by him (and that portion of his judgment was affirmed by the High Court, and it is not now disputed) that the plaintiffs altogether failed in making out their title by re-formation. The only substantial question which remains is, whether they are entitled to recover upon the ground that they had obtained a title to the 10 annas of B and C, and to the whole of D, by prescription. The first Court found that the plaintiffs had obtained such a title; but that decision was overruled by a judgment of the High Court from which the present appeal has been preferred. The long course of litigation with regard to the lots in dispute, and also with regard to the lot A which is not now in dispute, is thus shortly described by the Judge in his judgment at page 121 of the Record. He said:—"It seems necessary here to refer to the portion marked A, which, though not the subject of the present claim, has been the subject of similar litigation between the plaintiffs and the defendants Nos. 2 and 3. It will be seen on the map that A is the northernmost portion of the series of churs of which B, C, D, E and F are the portions now in dispute. A, it is said, first formed as an island in 1261, and the plaintiffs took possession of it as having been re-formed on the site of the diluviated Kismuts Chur Selimpore &c. Defendant No. 2 claimed it as an accretion to Audar Chur which is a part of Chur Kalkini, and was held by defendant in ijara from Government. A case was instituted under Act of 1840, which resulted in the plaintiffs being maintained in possession. Subsequently B and C formed in 1858, or 1859,

imilarly in a case under Act IV of 1840 the plaintiffs maintained in possession. In 1859 and 1861, defendants 2 and 3, and Abdul Ali, 2 and 3 being Ameerunnissa and Chatterjee, who is now represented by the other Chatterjee, brought suits in the Civil Court to set aside these awards. Defendant No. 2, in suit No. 85 of 1859, sued to establish her title to A; Abdul Ali, in No. 366 of 1861, sued to establish his title to two annas of A; and in No. 283 of 1861, defendant No. 3, or rather his predecessor in interest, Bykunt Lal Chatterjee, sued to establish his title to six annas of C, D. The Principal Sudder Ameen, whose decisions were reversed by the High Court (see 2 W. R., 34 and 127), decreed these suits, except in regard to D. So that by these judgments the whole of A was decreed to the defendants Nos. 2 and 3 and Abdul Ali, and six annas of B and C were decreed to defendant No. 3. The plaintiffs remained in possession of 10 annas of B and C, the whole of D, and the whole of E and F up to the year 1868, when they were ousted from possession on behalf of Government by the Collector who took possession of them with the defendants. The High Court, in their judgment upon appeal from the decision of the first Court, say at Supplemental Record, p. 4) :—"As regards the question of the awards under Act IV of 1840 in favor of the plaintiffs, and the failure of the defendants Nos. 2 and 3, to set aside these awards by Civil suits instituted by them, have given judgment that such a title as will enable them to recover possession, argued that the plaintiffs had not been in possession of the land claimed long enough to give them a title by prescription, for that the first re-formation of any of the land took place until 1859, and the plaintiffs were admittedly out of possession in 1868. Further that the plaintiffs' prescription would not avail against Government; that it appears that all these churs were formed in the bed of a river, and were not re-formation of the plaintiffs' land; that first they appeared as an island, and then became joined to the Kalkini side; that first the portion of the land called A appeared, and subsequently became annexed to the other portion, and then that, the other portion joined on to A and thus

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Wise  
v.  
AMEERUN-  
NISSA  
KHATOON.  
Judgment.

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 WISE  
 v.  
 AMEERUN-  
 NISSA  
 KATOON.  
 Judgment.

that, irrespective of the Government right to these, an-  
 forming in the bed of a navigable river, they also became acc-  
 to a Government estate, for Chur Kalkini belongs to G-  
 ment, and A and the other lands accreted to it." It ha-  
 held in a decision of the High Court that when lands are  
 as an island in the middle of a river, and are surroun-  
 water which is not fordable, they do not belong to Govern-  
 If before the Government takes possession any portion  
 water round the island becomes fordable from an adjacent  
 and the before-mentioned suits, in which the defendant  
 cceeded, were decided in accordance with the ruling. Bu-  
 decision was overruled by the High Court in a Full  
 decision in Volume XIV of the Full Bench Rulings of the V  
 Reporter, 28, and the High Court referring to it, say:—  
 Full Bench Ruling of the 17th August 1870 (*Budri*  
*Chowdhraim vs. Prosunno Coomar Bose*, 14 W. R., F. B  
 was referred to as showing that under the terms of cl-  
 section 41 of Regulation XI of 1825, these lands being  
 time of their first formation the property, or to use the w-  
 the Regulation, at the disposal of the Government, they  
 not subsequently become vested in the plaintiff or any on-  
 On the other hand, for the plaintiffs, it was argued that the  
 Court's decision was right; that there had been constant lit-  
 between the parties; that Ameerunnissa had always fai-  
 prove her title; that Mr. Wise had been declared ent-  
 retain possession; and that his possession under an A-  
 award of the re-formed lands for more than three years  
 his right to those lands. From the above statement it  
 seen that the plaintiffs do not seriously dispute the fin-  
 the lower Court; that they have failed to establish their  
 any portion of the lands in dispute, on the ground of re-for-  
 on the original sites belonging to them, but the plaintiff  
 that the Judge was right in holding that their title by p-  
 tion had been made out. Now the Judge in deciding thi-  
 appears to have over-looked the fact that the Governme-  
 been made the principal defendants, that it was the Gove-  
 who dispossessed the plaintiff, and who settled the land w-  
 other defendants, inasmuch as their title by prescription

avail them against the Government, for it is clear that the taking possession by a party not entitled will not give them a title unless the possession has been of such duration as to extinguish the title of Government. In the present case it has been found that the lands only began to re-form in 1859, and as the plaintiffs were admittedly dispossessed in 1868, they had not been in possession 12 years when dispossessed." The High Court, therefore, overruled the decision of the lower Court that the plaintiffs had obtained title by prescription.

It appears that Kalkini was originally gained from the river Aialkhan, in the district of Backergunge, and that Government had assessed it, as they had a right to do, under Regulation XI of 1825. It was settled as an accretion to lands which belonged to Ameerunnissa and Mahomed Wasil; 8 annas with Ameerunnissa for 20 years from the 3rd May 1848, and 8 annas with Mahomed Wasil for 20 years from the 10th May 1848. Mahomed Wasil failed to pay the revenue as to his 8 annas, and the Government took possession, and granted a lease of it to Ameerunnissa for 12 years, which expired in 1867. The settlement of Kalkini having expired in 1868, the Government re-settled it, and included the whole of the lands B, C, D, E and F as part of Kalkini in the new settlement. It was found by the Ameen, who was deputed to make a local investigation, that the lands were formed in the bed of the river. They, therefore, according to the Full Bench Ruling, reported in 14 Weekly Reporter, Full Bench Rulings, p. 28, belonged to Government who were entitled to take possession of them. The plaintiffs say in their plaint:—"The defendant No. 1," that is, the Collector, "on the occasion of the re-settlement of Chur Kalkini on the part of the Government, caused the entire area of the said Chur," that is, the whole of the lands which are claimed in the declaration, "to be measured with Chur Kalkini, and ousted us therefrom in the beginning of 1275, and made a settlement thereof with the defendants Nos. 2 and 3, after disallowing our objections." Ameerunnissa did not act in violation of Act IV of 1840. It was the Government who were entitled to the property, who took possession of the land, and put Ameerunnissa and the other defendant into possession of it under the new settlement.

1879  
WILSON  
v.  
AMEERUN-  
NISSA  
KHATOON.  
Judgment.

1879  
 WISE  
 v.  
 AMBERUN-  
 WISSA  
 KHATOON.  
 —  
 Judgment.

It was contended that the Government could not, in consequence of the provisions of Act IX of 1847, include the lands which are now in dispute with Chur Kalkini without a survey. The matter was referred to the Commissioner, and the Commissioner thought that the Government had no right to make settlement; but the defendants, having been put in possession by the Government, they proceeded under section 3 of the Criminal Procedure Code, which had been substituted for Act IV of 1840, and obtained an order against Wise and others by which they were to be retained in possession. This is also stated by the plaintiffs in their plaint. They say:—"The Collector having ousted them from the lands in dispute, made settlement thereof with the defendants Nos. 2 and 3 after disallowing our objections. The Commissioner, on our appeal, ordered the said land to be excluded from the said settlement but a suit was instituted for possession under section 318 of the Criminal Procedure Code. On the 9th August 1869, it was ordered that the land should remain in possession of the defendants Nos. 2 and 3. Moreover, under the orders of the Revenue Board, dated the 31st October 1870, the said lands have again been brought under settlement." The case had come on appeal from the Commissioner to the Board of Revenue, and they had held that the Government was justified in making a settlement of the lands as a part of Kalkini.

Even if the Government was not entitled to assess the lands in consequence of Act IX of 1847, they were entitled to take possession of them as lands which originally formed as an island, and were at their first formation surrounded by water which was not fordable, and they were entitled to oust the plaintiffs, who were trespassers, and to put the defendants into possession.

It is quite clear that the plaintiffs have failed to make out a title. The defendants were put into possession by the Government, who were entitled to the lands, and they were ordered by the Magistrate, under the Code of Criminal Procedure, to be retained in possession. If the plaintiffs had wished to contend that the defendants had been wrongfully put into possession, and that the plaintiffs were entitled to recover on the strength of their previous possession without entering into a question of

all, they ought to have brought their action within six months under section 15 of Act XIV of 1859; but they did not. The High Court, with reference to this point, say (in their Lordships' opinion, correctly say):—"Further, possession having been given to the defendants under section 118 of the Code of Criminal Procedure, in accordance with the Deputy Collector's award, the plaintiff will not be entitled to a decree until and unless he can show a better title to these lands than the defendants. The fact that the plaintiff's possession as regards B, C and D was confirmed by Act IV of 1880, and that the defendants Nos. 2 and 3 unsuccessfully endeavoured to disturb them by legal suit, does not deprive the Government of the right of Government. Section 2 of Act IV of 1840, relates to persons concerned in the dispute. If Kalkini had brought his suit to a private individual he might have reduced into his possession lands which had accreted to the estate, and which he lawfully held. But lands to which he is unable to make title cannot be recovered on the ground of previous possession, except in a suit under section 15 of Act XIV of 1859, which must be brought within six months from the time of dispossession."

The Lordships are of opinion that the High Court was right in saying that the plaintiffs had failed to prove a right by title. Act XIV of 1859, section 1, clause 7, enacts that, "if brought by any person bound by any order respecting possession of property made under clause 2, section 1, of Act IV of 1838, or of Act IV of 1840, or any person claiming as such party for the recovery of the property comprised in the order, the period of three years from the date of the final order in the case." This, however, is not a suit brought by the plaintiff and the other defendants, but it is a suit brought by the plaintiff. Act IV of 1840 had nothing whatever to do with title, but merely regarded possession. The Magistrate was not to determine title, but merely to ascertain who was in possession and to retain him in possession. Their Lordships are of opinion that, independently of the title of Government to the land, it appears to have been originally formed as an island in the river, possession for three years, under an order

1879  
 WISE  
 v.  
 AMBERUN-  
 NISSA  
 KHATOON.  
 Judgment.

1879  
 WISE  
 v.  
 AMEERUN-  
 NISSA  
 KHATOON.  
 Judgment.

of a Magistrate in a proceeding under Act IV of 1840, does not create a title by prescription.

The plaintiffs' suit was, therefore, properly dismissed as to B, C and D. As regards plots E and F, it was found by the first Court that they were not originally accretions to D, and that the defendant Ameerrunnissa had satisfactorily established the fact that they belonged to her (Record, p 128).

The plaintiffs, upon the appeal of the defendant to the High Court, objected to the decision of the first Court as to E and F, upon the ground that they were entitled to them as accretions to B, C and D; but the High Court held that as they had found that Wise had no title to B, C, and D, his claim must fail as to E and F (Record, p. 137). The appellants having appealed to Her Majesty against the judgment of the High Court as to B, C and D, appealed also as to E and F, upon the ground that they were accretions to B, C and D (Appellant's case, p. 26). But their Lordships having affirmed the judgment of the High Court as to B, C and D, it follows, as a matter of course, upon the appellant's own contention, that the decree as to E and F must also be affirmed.

Under these circumstances, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court.



## [PRIVY COUNCIL.]

BUDRI PARSAD . . . . . APPELLANT;  
 AND  
 MURLIDHUR AND OTHERS . . . . . RESPONDENTS.

1879  
 Nov. 27th.

*Mortgage—Account, Contract by mortgagee to be relieved from obligation to  
 —Regulation XXXIV of 1803, sections 9 and 10.*

In a mortgage executed in 1852 while Regulation XXXIV of 1803 was in force, the mortgagor contracted that he should not have any right or claim to an account of mesne profits during the time of the mortgagee's possession. *Held*, that the contract was binding, notwithstanding the provisions of sections 9 and 10 of that Regulation imposing an obligation on the mortgagee to account.

**A**PPEAL from a decision passed by the High Court of the North-Western Provinces at Allahabad.

The facts will be found stated in the judgment of their Lordships of the Judicial Committee (1) of the Privy Council, which was as follows:—

This is a suit brought by the purchaser and assignee of a mortgagor's interest against the purchasers and assignees of the mortgagee's interest. The mortgage deed between the original parties was dated 16th January 1852. It was a mortgage of what was called the malikana interest of certain talookdars; the amount of that malikana being, during the pendency of the then settlement, fixed and known sum. The mortgage deed contained this stipulation:—"We hereby make a written agreement that the said mortgagee, having taken possession of the mortgaged villages, shall all the powers enjoyed by us, may, on his own authority, collect the jumma fixed by the Government from the villages of the taluqa, and himself pay the revenue to the Government, instalment by instalment, according to the usage in the pergunnah; that he may bring to his own use the income of the malikana due to the taluqdars, crediting every harvest Rs. 1,656 per year, as interest on the

Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E.  
 Sir ROBERT P. COLLIER.

1879  
 BUDRI  
 PARSAD  
 v.  
 MUGLIDHUR.  
*Judgment.*

amount of consideration on this mortgage, at the rate of one per cent. per mensem, and take the remainder, Rs. 565, the surplus of the malikana, as his own collection fee, and pay off the agent and peons employed for making collections in the villages; that is, he may credit the income of the malikana to the payment of two items—one, the interest on the mortgaged amount, and the other the expenses incurred in making collections in the villages; for we have agreed that the amount of interest of the mortgage consideration, and the expenses of making collections in the villages, should be equal to (or cover) the malikana profits, and we have no longer any right to claim a rendition of the account of mesne profits accruing during the time of the mortgagee's possession."

The principal question raised by the present appeal, and argued by Mr. Doyne at the bar, is whether this agreement is sufficient to deprive the plaintiff of his statutory right, under the 9th and 10th sections of Regulation XXXIV of 1803, to call upon the defendants to render the account mentioned in those two sections. A preliminary question however arises as to the legal validity of the agreement. There can be no doubt that such a contract would, previous to that Regulation, have been a good and legal contract, and that it would, under the law as it now exists since the repeal of the usury laws, be also a good and legal contract, it being an old and well-known customary form of mortgage that the mortgagee should take the mesne profits in lieu of interest, and so be saved from having to account for them. But there can be, on the other hand, no doubt that at the time when this mortgage was made, the law by which the contract was governed was otherwise, that the Regulation had limited the rate of interest to 12 per cent. and contained provisions under which securities might be avoided if they contracted directly or indirectly for a higher rate of interest; and that the taking of the accounts between mortgagor and mortgagee was regulated by the 9th and 10th sections. Therefore, if the stipulation in question had been made as an evasion of the usury law introduced by the Regulation, as a contrivance for giving the mortgagees a higher rate of interest than that to which they were by law entitled, it would have been a bad contract, and could not have prevented the accounts from being taken in the usual manner. In the present

case, however, both the Indian Courts have found in favor of the legal validity of the stipulation as will presently be more fully stated. It has, however, been contended that, however this may be, a mortgagee cannot, by contract, relieve himself from the statutory obligation of filing accounts under the 9th and 10th sections; and this is the principal, if not the only, point raised by the appellant.

1879  
 BUDEI  
 PARSAD  
 v.  
 MURLIDHUR.  
 Judgment.

Their Lordships are of opinion that this contention is not well founded. There is nothing in the Regulation which says expressly that the accounts must be filed, whether they are required for the determination of the rights of the parties in the suit or not. On the other hand, the 15th section says:—"Nothing in this Regulation being intended to alter the terms of contract settled between the parties in the transactions to which it refers (illegal interest excepted), the several provisions in it are to be construed accordingly, and any question of right between the parties is to be regularly brought before and determined by the Courts of Civil Justice."

It is under this enactment that the Courts below have tried and determined the validity of the stipulation in question. They have found that it is not in the nature of a contract for interest; that there was no evasion thereby of the law, or any contract to give usurious interest; that the Rs. 565 constituted a percentage which was *bond fide* agreed to be allowed to the mortgagees for the expense and risk of collecting; and which, being only about 5½ per cent., was certainly neither exorbitant nor unusual. Having so found, they were bound to give effect to their decision, by treating the agreement as an answer to the suit, which proceeded on the assumption that the whole of the mortgage money, principal and interest, would be satisfied, if the accounts were taken contrary to the legal contract of the parties, on the basis of charging the mortgagees annually with the Rs. 565, or so much thereof as they should fail to prove, had been actually expended by them in respect of the costs of collection.

Their Lordships must by no means be taken to decide that if amounts received by the mortgagees had been fluctuating, might not, have been bound to file the statutory accounts.

1879  
BUDAI  
PASAD  
v.  
MURLIDHUR.  
Judgment.

Those accounts might have been necessary to enable the Court to decide on the validity of the contract set up. In the present case, however, it is clear that the only sum which the mortgagees could receive, *ultra* the interest, was a fixed and unvarying balance of Rs. 565, and this the Courts have found to be a sum which the parties might legitimately agree to fix as the allowance to be made for the costs of collection. If this be so, the only result of compelling the defendants to file accounts would be to increase the costs of suit, which must ultimately fall on the plaintiff.

Their Lordships, therefore, see no reason for questioning the correctness of the decision to which both the Indian Courts have come, and they must humbly advise Her Majesty to confirm the decree of the High Court, and to dismiss this appeal with costs.

[CIVIL APPELLATE JURISDICTION.]

1880  
 March 19th.  
 No. 792 of  
 1879.

OBBOY CHURN PAL AND ANOTHER (PLAINTIFFS) APPELLANTS;  
 AND  
 KALI PROSAD CHATTERJEE (DEFENDANT) . RESPONDENT.

*Act VIII (B.C.) of 1869, Resumption proceedings under—Partis—Limitation—Lakhiraj Title—Specific Relief Act, I of 1877, section 43—Declaratory Decree.*

In proceedings taken in 1875 before the Collector to assess the rent of certain land which had been declared in 1863 liable to assessment, the plaintiffs, who had not been made parties to the proceedings in 1863, and who claimed to hold shares in the land, claimed to hold their shares as lakhiraj. Their claim was disallowed on the ground that they had no *locus standi*, and in March 1877 a final order was passed fixing a specific rent for the whole land.

In June 1877, the plaintiffs instituted a suit to set aside that order, and to have a declaration that they held their shares as lakhiraj. It appeared that the plaintiff's allegation that they held shares in the land was correct.

*Held*, that the proceedings in 1863 were not binding on the plaintiffs or their interests in the land, and that inasmuch as the defendant was barred from instituting resumptions against them, his right to receive rent was also barred, and therefore the title of the plaintiffs to hold their shares rent free was complete.

*Held*, also, that under section 42 of the Specific Relief Act (I of 1877) the plaintiffs were entitled, under the circumstances, to a declaration to the effect that they held their shares rent free.

1880  
OBHOY  
CHURN PAL  
v.  
KALI PRASAD  
CHATTERJEE.  
Judgment.

**A**PPPEAL from a decision passed by the District Judge of East Burdwan, reversing a decree of the Moonsiff of Raneegunge.

The facts are fully set out in the judgment of the High Court.

Baboo *Aushootosh Dhur*, for the Appellants.

Baboo *Troilukhonath Mitter*, for the Respondent.

The judgment of the High Court (1) was as follows :—

The circumstances out of which the present litigation has arisen are these :—

The appellants, who were the plaintiffs in the first Court, claim to be entitled to certain shares in two properties, forming part of 46 beegahs 7 cottahs and 2 chittacks of land situate within the Mouzah Brahminara.

In 1862, the then putnidar of this mouzah instituted resumption proceedings in the Court of the Principal Sudder Ameen against one Ram Tonu Pal and another, for the purpose of having it declared that the 46 odd beegahs of land was liable to assessment. Ram Tonu Pal and his co-defendant alleged that the land was held under a valid lakhiraj title, and further alleged that several other persons, besides themselves, were interested in the land in question.

Seventeen other persons were accordingly added as defendants, and the case proceeded to trial. The Principal Sudder Ameen held that the lakhiraj title was not proved, and on the 11th July 1863, declared the land liable to assessment. In making his decree he considered that he had before him all the persons interested in the land. But the present appellants were admittedly not amongst the number of the defendants. They allege that they were minors at the time, and none of the nineteen defendants were stated in the record to represent their interests in the land. No steps were taken under the resumption decree to have a rent fixed upon the land until 1875, when the respon-

(1) WHITE and MACLEAN, J.J.

1880  
OBHOY  
 CHURN PAL  
 v.  
 KALYAN PRASAD  
 CHATTERJEE.  
Judgment.

dent, the first defendant in the first Court, who had in the meantime become the purchaser of the putni talook at a sale in execution of a decree for rent passed against the prior putnidar, commenced proceedings before the Collector with a view to the assessment of the land. The appellants appeared before the Collector in the course of those proceedings, and claimed to hold their shares as lakhiraj. The Collector did not go into their claim, but disallowed it, apparently on the ground that they had no *locus standi* to oppose the assessment. On the 21st of December 1876, he fixed upon the entire 46 beegahs of land a specific rent which was affirmed by the Board of Revenue, and a final order was passed by the Collector on the 6th of March 1877.

In June 1877 the appellants brought their present suit in which they seek to have the Collector's order fixing the rent set aside as against them, and to have it declared that they are entitled to hold their shares of the two properties included in the 46 beegahs exempt from the payment of rent, and to be confirmed in the possession of their shares.

The first defendant, in his written statement, disputed the right of the plaintiffs to the shares which they claimed, or to any share in the land. He also relied upon the decree in 1863 which had declared the land to be *mal*, or liable for rent, and alleged that the plaintiffs were bound by those proceedings, inasmuch as they were members of a joint Hindu family of which their uncle, Halodhur Pal, was the head and manager, and inasmuch as Halodhur Pal was one of the defendants in the resumption proceedings which terminated in that decree.

The Moonsiff held that the plaintiffs had proved their right to share in the two properties, but not in one of them to the extent of the share claimed. He also held that the plaintiffs were separate in estate from their uncle, and were not parties to, nor were represented in, the resumption proceedings of 1863. He further considered that the plaintiffs were not required in the present suit to prove the validity of their title to hold the shares rent-free, but being clearly of opinion that they were bound by the Collector's assessment, he passed, what he called a modified decree, and declared that they were entitled to 1 g. 15 g. 2 c. and 2 d. share of the properties in dispute, and that

the assessment made by the Collector, so far as the plaintiffs were concerned, was illegal and void.

The Judge of Burdwan, on appeal, dismissed the plaintiffs' suit, on the ground that to get the declaration asked for, it was essential that they should prove a rent-free title in themselves, and that their vakeel admitted that they had not proved such title affirmatively in the first Court.

I agree with the learned Judge that the Moonsiff was wrong in dropping the question of lakhiraj title, which the plaintiffs sought to have declared, and in proceeding to declare them merely entitled to shares irrespective of title.

The declaration of a lakhiraj title is the gist of the declaration. If the plaintiffs are not entitled to have such a declaration, their suit ought to be dismissed.

I also agree in what is implied in the learned Judge's judgment that as the plaintiffs have come into Court to obtain the declaration, the *onus* lies on them to show that they have a lakhiraj title. But I also think that they have proved it by showing that they are not bound by the resumption decree of 1863, and that the respondent is barred by the law of limitation from taking resumption proceedings against them.

The decree in the resumption suit is not a decree *in rem* or conclusive as to the *status* of the land, and, therefore, only binds the parties to that suit and their respective interests in the land. It is admitted before us that the first defendant is barred by the Limitation Act, and, that being so, then by the force of the last section of that Act the right to receive rent from the plaintiffs, in respect of their shares of the land, is extinguished, and the plaintiffs' title to hold their shares rent-free is complete.

A suit for rent is, I think, a suit for the possession of property in the meaning of that section, and no such suit could be brought against the appellants until it had been determined in a previous suit brought against them by the respondent, that the shares were liable to assessment. If the previous suit is dismissed, the suit for rent must be so also.

What the vakeel before the Judge below understood by affirmative proof, I do not know; but probably all that he meant was that the clients had not proved, or could not prove by documentary

1880

OBHOY  
CHUBB PAL  
v.  
KALI PRASAD  
CHATTERJEE.

Judgment.

1880  
 OBHOY  
 CHURN PAL  
 v.  
 KALL PRASAD  
 CHATTERJEE.

*Judgment.*

or other evidence, that the land, in which his client had shares, had been held rent-free from before the date of the Permanent Settlement.

From the view which the Judge below took of the proof necessary to establish a lakhiraj title in the plaintiffs, it became unnecessary for him to decide, at the hearing of the appeal before him, whether the plaintiffs had any share in the two properties included in the land assessed by the Collector, or what was the extent of their shares, or whether they were bound by the resumption decree?

As regards the last point, inasmuch as they admittedly were not made parties defendants, nor were represented on the record by any one of the 19 defendants who were made such parties, I think that they are not bound by the decree.

As regards the first two points, it appears upon enquiry that they were not amongst the respondent's grounds of appeal to the lower Appellate Court. The respondents must, therefore, be taken to have accepted the finding of the Moonsiff, that the plaintiffs had the shares mentioned in his decree, it will be unnecessary therefore to remand the case to the lower Appellate Court.

I am of opinion that the plaintiffs are entitled to a declaration that they hold their shares of the two properties in question free of rent, and are entitled to continue in possession of the same without being affected by the Collector's order of the 6th of March 1877, assessing rent on the 46 beegahs. The suit was instituted after the Specific Relief Act, 1877, came in force, and I think that, having regard to the terms of section 42 of that Act and the accompanying illustrations, the Court ought, under the circumstances appearing in this case, to make such a declaration.

The resumption decree purports to render the whole land liable to assessment. Recently, and after that decree had been idle for about twelve years, the present putnidar has taken proceedings before the Collector to have the benefit of that decree. Canungo has been sent by the Collector to measure the whole land and fix the rates payable for the whole, and a final order assessing the rents upon the whole has been passed. The plaintiffs' appearance before the Collector to prevent the application



tion of the order to their shares has been in vain. If the rent assessed is not paid, there is every probability that all the land will be put up for sale and the plaintiffs will be left to fight the question with an auction-purchaser. At all events a state of things has arisen in consequence of the resumption decree, and the action of the respondents, which renders the plaintiffs extremely liable to be disturbed in the possession of their shares, and to be involved in harassing litigation.

The appeal will be allowed. The decree of the lower Appellate Court reversed, and in lieu of it the plaintiffs will have a decree embodying the declaration which I have mentioned.

The plaintiffs will have their costs of this appeal, and also their costs in the Court below.

1880  
OBHOY  
CHURN PAL  
v.  
KALI PRASAD  
CHATTERJEE.  
Judgment.

#### [CIVIL APPELLATE JURISDICTION.]

MOHUN DASS (PETITIONER) . . . . . APPELLANT;

Feb. 9th.

AND

LUCHMUN DASS GOSSAMI . . . . . RESPONDENT.

No. 271 of  
1878.

*Probate, Revocation of—Succession Act (X of 1865), section 234.*

Where probate of a will of a deceased Mohunt, under which he appointed the executor his successor, was granted to such executor, it was held, that the fact of the executor having subsequently been excluded from the community of Mohunts on account of his misconduct was not a just cause for the revocation of the probate, within the meaning of section 234 of the Succession Act.

**A**PPEAL from a decision passed by the District Judge of Moorshedabad.

The petitioner in this case sought to impeach the fitness of the executor appointed under the will of a deceased Mohunt, to manage and administer a certain religious endowment bequeathed to him, by reason of his misconduct, and asked that the probate which had been granted might be revoked.

The District Judge held the Court had no power to make an inquiry as to whether the executor had by his conduct disqualified himself for the office, and accordingly dismissed the petition. The petitioner thereupon appealed to the High Court.

1880  
 MOHUN DASS the Appellant.

v.  
 LUCHMUN  
 DASS  
 GOSSAMI.

Baboo Gepaul Loll Mitter, and Baboo Guru Das Banerjee, for

Baboo Surendronath Motilal, for the Respondent.

*Judgment.*

The judgment of the High Court (1) was as follows :—

The petitioner, who is the appellant before us, moved the Judge of the District of Moorshedabad to revoke the probate of a will under which the respondent had been designated as Mohunt at the head of a certain religious institution. It was alleged that this Mohunt had, since he took charge of the office, taken to certain courses of conduct whereby he had tarnished his name, and in consequence whereof he has been excluded from the community of the Mohunts. The Judge considered that this was not a case in which the provisions of section 234 of the Indian Succession Act authorized him to revoke, or annul the grant of probate, and the petitioner being dissatisfied with this decision has appealed to this Court, and before us it is contended that the section referred to does apply to such a case, and that the proof of that is to be found in illustration (h) which refers to the case of a person to whom "probate was, or letters of administration were, granted, and who has subsequently become of unsound mind." And it is argued that as the Court is entitled so to act in the case of a person mentally disqualified, so it is also entitled to act in the case of persons who are proved to be morally disqualified. It appears to us that this contention is founded upon an entire mistake, and that there is a considerable difference between the case of a person contemplated in the illustration and that of a person against whom the present suit is directed. Illustration (h) has reference to the case of an executor who is acting under a probate, and whose lunacy subsequently of course disables him from acting under the will, that lunacy being established by a regular enquiry under the direction of the Court under the Act relating to that subject. The respondent now before us is not an executor. He obtained probate of the will of the late Mohunt, and under the operation of that will is now at the head of the institution, and unless just cause for revocation of the grant of probate is made out under the law he cannot be removed. The proper course, as it seems to me,

(1) JACKSON and TOTTENHAM, J.J.

for depriving the respondent of the office, would be to bring a suit under the Religious Endowment Act, or any other suit for a declaration that the executor has disqualified himself; and, if in that suit a decree is obtained and duly certified to the Court, the Court no doubt will direct the revocation of the probate. The present appeal will be dismissed with costs.

1880

[CIVIL APPELLATE JURISDICTION.]

ALIMUNNISSA KHATOON (DEFENDANT). . APPELLANT;

AND

SYED HOSSEIN ALI (PLAINTIFF) . . . . RESPONDENT.

May 10th.

No. 294 of  
1878.

*Limitation Act (XV of 1877) section 4—Appeal, Limitation not taken in grounds of—Appeal against portion of decree—Procedure.*

Where a suit, which ought to have been dismissed under section 4 of the Limitation Act, although limitation was not set up as a defence, is not dismissed, the defendant, in order that the question of limitation may be dealt with by the Appellate Court, must appeal on the whole case.

**REGULAR APPEAL** from a decision passed by the District Judge of Dacca.

In this case the plaintiff sued to recover from the defendant the sum of Rs. 7,185-5-9, which he had paid on her behalf under an agreement. There was also a claim of interest calculated at the rate of 24 per cent., and the interest, together with the principal sum, amounted to Rs. 13,113-3.

A decree was given in the Court below for that amount. The defendant then appealed to the High Court against so much of the decree as allowed the calculation of interest at 24 per cent.

The appeal was valued at Rs. 6,344-10-4. That the suit was barred by limitation was not taken in the grounds of appeal.

*Allen*, and Baboo *Durga Mohun Dass*, for the Appellant.

*Paul* (Advocate-General), Baboo *Rash Behary Ghose*, and *Salvie Serajul Islam*, for the Respondent.

1880  
 ALIMUNNISSA  
 KHATOON  
 v.  
 SYED  
 HOSSAIN.  
 ———  
*Judgment.*  
 ———

*Allen* proposed to contend that the suit was barred by limitation. Limitation, it was true, had not been pleaded in the Court below, nor had it been taken in the grounds of appeal to the High Court; but, he submitted, under section 4 of the Limitation Act (XV of 1877), the Court was bound even then to consider that question, and if it found the contention right, to dismiss the suit.

[JACKSON, J.—You cannot now ask us to dismiss the suit on the ground that it is barred. You have appealed against part of the decree.]

*Allen*.—Illustration (a) annexed to section 4 of Limitation is not restricted to cases where the whole case is appealed against. The words are general.

Under the terms of that illustration—and it explains the question—it is competent to the Court to go into the question of limitation.

The respondent was not called upon.

The judgment of the Court (1), which was as follows, delivered by

JACKSON, J. JACKSON, J. :—

The only two questions which arise upon this appeal are: first the question of limitation, which, although neither taken in the Court below, nor, as I understand, in the memorandum of appeal here, has been mentioned by Mr. Allen, and he desired to be heard upon it; and, secondly, the question of interest.

As to limitation, Mr. Allen contended that according to section 4 of the Limitation Act of 1877, a Court of Appeal is bound to dismiss the suit upon it appearing that limitation had been incurred, although limitation had not been set up in defence. That does not appear to me to be the proper construction of the section. That section says:—"Subject to the provisions contained in sections 5 to 25 (inclusive), every suit instituted, appeal presented, and application made, after the period of limitation prescribed therefor by the second schedule annexed, shall be dismissed, although limitation has not

(1) JACKSON and TOTTENHAM, J.J.

set up as a defence." That compels the Court hearing the suit which has been instituted after time to dismiss the suit, although limitation has not been set up as a defence. In like manner it compels an Appellate Court, where the appeal has been presented after the period prescribed therefor, to dismiss the appeal notwithstanding that no such objection has been raised. But where the error, if any, has occurred in the Court of First Instance, that is to say, where a suit, which ought to have been dismissed under the operation of that section, although limitation was not set up as a defence, has not been so dismissed, in order to bring that matter before the Appellate Court, the defendant below must appeal upon the whole case, and not as has been done, appeal merely upon a particular part. We were willing to go into the question of limitation if the full amount of the stamp duty upon the appeal had been put in, but the appellant is not prepared to do that, and consequently we do not go into that question.

[The learned Judge then dealt with the facts of the case, and in the end dismissed the appeal.]

1880  
ALIMUNNISSA  
KHATOON  
v.  
SYED  
HOSEIN.  
—  
Judgment.  
—  
JACKSON, J.

### [CIVIL APPELLATE JURISDICTION.]

CHUNDI CHURN ROY . . . . . APPELLANT;  
AND  
SHIB CHUNDER MUNDOL . . . . . RESPONDENT.

April 30th.  
No. 1176 of  
1879.

*Julkar Right—Fishery, Right of—Easement, Definition of—Limitation Act, XV of 1877, sections 3 and 26.*

A right of fishing is an easement within the meaning of section 3 of the Limitation Act (XV of 1877), and a prescriptive right to such an easement can only be acquired by an uninterrupted user for 20 years.

APPEAL from a decision passed by the Judge of East Alwan, reversing the decree of the Moonsiff of Jehanabad.

Baboo Goopee Nath Mookerjee, for the Appellant.

Baboo Bepin Behary Chatterjee, for the Respondent.

1880  
CHUNDI  
CHURN ROY

v.  
SMIB  
CHUNDER  
MUNDOL.

Judgment.

WHITE, J.

The facts are set forth in the judgment of the High Court (1) which was delivered by

WHITE, J.:—

This is an appeal against the decree of the District Judge of Burdwan, reversing the decree of the Moonsiff which had been passed in favor of the plaintiff, who is the appellant before us.

From the language of his plaint it is dubious whether the plaintiff, who is the appellant before us, claims the ownership of the portion of the khal mentioned in the plaint, or whether his claim is confined to a right of fishing in the water of that portion of the khal. In the course of the proceedings, however, the point was cleared up; for the Moonsiff says in his judgment that the plaintiff's claim was limited to a prescriptive right of fishery and it is clear from his grounds of appeal to this Court that the plaintiff accepts that view of his case.

The Moonsiff, finding that there was upwards of twenty years enjoyment of the right to fish proved by the plaintiff, passed a decree in his favor.

The learned Judge in the lower Appellate Court, in reversing that decree, makes this observation:—"Section 26 of the Limitation Act, and the 20 years' prescription there spoken of, have no application in the present case, which is not a case of an easement, for the simple reason that there is admittedly no dominant tenement. What the plaintiff claims is not a right appurtenant to any property in his possession. He claims a right in gross, a right to fish in a khal, which is admittedly not on his land. He does not say how he came to acquire the right originally. He relies merely upon the alleged fact of having exercised it for a number of years."

Now in the first place, the judgment over-looked the fact that the word "easement," as used in the Indian Limitation Act, has by force of the interpretation clause, section 3, a very much more extensive meaning than the word bears in the English law; for it includes "any right not arising from the contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing from

attached to, or subsisting upon, the land of another." An easement, therefore, under this law embraces which in English law is called a profit *à prendre*, that is, a right to enjoy a profit out of the land of another. It is argued that the clause does not extend to a fishery, but I entirely disagree with the argument. The legal meaning of "land" is not only dry land, but also land covered by water; and I see no reason for holding that the word "land," as used in section 3, bears other than the legal meaning which ordinarily attaches to the word. Taking land to have this meaning, fish may properly be said to grow or subsist upon it.

Again section 27 of the Act, which contains a proviso applicable to the whole doctrine of the acquisition of easements by possession as laid down in the previous section, expressly mentions water as well as land, and as the word "easement" has the extended meaning given to it by the interpretation clause, I think that, if there was any doubt on the subject, the language of the proviso makes it clear that the profit arising from water as well as from land was in the contemplation of the Legislature. It would be attributing a singular oversight to the Legislature if we were to suppose that when dealing with profits *à prendre* it intended to omit a right of fishery, which is one of the most common classes of property enjoyed in this Presidency.

It is true, as the Judge says, that the right claimed by the plaintiff is not a right appurtenant, but a right in gross. Still a profit *à prendre* in gross, which is the technical name of the right claimed by the plaintiff, is a right recognized by the law, and may be established by the very same sort of evidence as used to establish either a profit *à prendre* appurtenant on an easement in the ordinary sense of the word.

It is clear, therefore, that the Judge in dealing with the appeal has fallen into an error of law.

The case must, therefore, go back in order that the lower Appellate Court may decide upon the evidence of user which the plaintiff has given. Although the Moonsiff has found in favor of the plaintiff, the defendant (who is the respondent before us) is entitled to have the opinion of the lower Appellate Court upon the question whether the user has been of that nature and of that character which confers the right claimed.

1880  
CHUNDI  
CHURN ROY  
v.  
SHIB  
CHUNDER  
MUNDOL.  
Judgment.  
WHITE, J.

1880  
 CHUNDI  
 CHURN ROY  
 v.  
 SHIB  
 CHUNDER  
 MUNDOL.  
 —  
*Judgment.*  
 —  
 WHITE, J.

The user necessary for the purpose must, as section 26 of the Limitation Act provides, be an "enjoyment as a right without interruption and for 20 years."

The Judge, in the latter part of his judgment, alludes again to the Limitation Act, and treating it as doubtful whether the right claimed was an interest in immoveable property, goes on to say that, supposing it was such an interest, the plaintiff had not shown that he had exercised the right adversely to the defendant for more than 12 years before suit. This is a misapplication of the law of Limitation. What the plaintiff has to prove in order to establish his right is not 12 years' adverse possession, but 20 years' uninterrupted enjoyment of the fishery as of right. If he gives evidence of such a user—and it is not contradicted by trustworthy evidence on the part of the defendant—it is sufficient to establish the right which the plaintiff claims.

The lower Appellate Court, in the introductory part of its judgment, alludes to some question that was raised before it as to the termini of the portion of the khal over which the plaintiff claims the right to fish. We have examined the question, and consider the termini must be taken to be those which are mentioned in the decree as amended by the order of the Moonsiff on the 24th of June 1878, viz., from the boundaries of village Barambatti to those of the village Baijna. These are the boundaries mentioned in the body of the plaint, and the Moonsiff, who gave the judgment on the 15th of February 1878, accepts these as the boundaries. The confusion arose from a mistake in the schedule annexed to the plaint, which gave Bijatkana instead of Baijna as one of the termini. In drawing up the decree of the first Moonsiff, the boundaries, as given in the schedule, were introduced instead of those which appear in the body of the plaint and in the Moonsiff's judgment. This mistake was corrected, and properly corrected, by the amending order of the 24th of June 1878.

The appeal is allowed, and the case remanded to the lower Appellate Court for retrial. That Court, in retrying the case, will have regard to the foregoing observations and directions. The costs will abide the event. The costs of the retrial are left to be dealt with by the lower Appellate Court.



## [CRIMINAL JURISDICTION.]

IN THE MATTER OF DOWLAT SING . . . PETITIONER.

1880  
March 22nd.*Criminal Procedure Code (Act X of 1872), sections 227 and 464—Conviction, Statement of reasons for.*No. 46 of  
1880

Although generally it is not necessary, in cases in which no appeal lies, for a Magistrate to record the reasons for passing his judgment, yet under clause (h) of section 227 of the Code of Criminal Procedure, in case of conviction, he ought to enter in the register to be kept under that section, a brief statement of the reasons for such conviction; but an omission to do so may, under some circumstances, be remedied at a subsequent time.

**CRIMINAL MOTION** to set aside a conviction of, and sentence passed against, the petitioner.

The circumstances under which the sentence was passed appear from the judgment of the High Court.

*Branson, Baboo Mohesh Chunder Chowdhry, and Mr. H. A. Adis,* appeared for the Petitioner.

The judgment of the Court (1) was as follows :—

The offence imputed to the petitioner in this case is that he, being a person in the employ of some person possessing landed interest in the District of Rajshahye, went upon land belonging to the defendant, and forbade him from cutting the crops then standing on the land, and used some degree of violence towards him and also used threats.

Now, it appears that there is, or there was, a question between the employer of the accused and the complainant, as to the precise amount of rent which was due from the complainant. It is said that a survey had recently taken place which showed the complainant to be in occupation of more land than he was paying for. The complainant, however, was one of several tenants and it may be supposed, anticipating a demand of this sort, have

(1) JACKSON and TOTTENHAM, J.J.

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 Judgment.

deposited their rent in the Collectorate. Under these circumstances, it is obvious with reference to section 69 of the Rent Act, that the landlord could not have distrained, and did not in fact attempt to distrain for the rent which he at that time claimed to be due, and the view which the Magistrate appears to have taken of the facts is, that the landlord being unable to resort to distraint, had endeavoured to intimidate the tenant from cutting or carrying away the crops, either until he had paid the amount demanded, or until that question had been somewhat settled. Now, according to section 441 of the Indian Penal Code, a person commits criminal trespass who, having lawfully entered into, or upon property in the possession of another, unlawfully remains there with intent thereby to intimidate, insult or annoy the person in possession of that property, and it appears to us that the petitioner might well be convicted of the offence of criminal trespass, for although he had lawfully gone upon the property of another person with the intention of stating a demand, though without the intention of resorting to the usual and proper form, he unlawfully remained there with intent to intimidate the tenant in furtherance of his claim for rent. It is clear, therefore, that the question whether the petitioner had committed an offence or not, depends entirely on the turn which the evidence took, and upon the Magistrate's view of the credibility of that evidence. The Magistrate appears to have taken considerable pains in this case, heard the evidence at some length, and thought that the offence amounted to one of criminal trespass; so that as regards the merits of the case it appears to us that there is no ground for interference with the conviction.

Then it is said that the conviction has been arrived at in this case without setting forth a brief statement of the reasons therefor as provided by clause (h), section 227 of the Code of Criminal Procedure, and that the Court ought not to allow such an omission to be remedied by a subsequent statement of the reasons. It appears to us that we ought not to lay down, as a rule, that in no circumstances ought a Magistrate to be allowed to supply the omission which he had made under this section of the Code, and in the present instance there appears to be good reason for the omission, that is to say, the Magistrate was not

aware that it was necessary, nor had he been accustomed to record such reasons. It appears to us that he is in error as to the construction which he puts upon that clause. There is at first sight an inconsistency between clause (h) and the previous part of section 227, which says that "the Magistrate need not record the reasons for passing the judgment, nor draw up a formal charge," whereas clause (h) requires him "to enter, in a register to be kept for the purpose, the finding, and in the case of a conviction, a brief statement of the reasons therefor." The meaning of this is, we think, clear enough. Generally speaking, by section 464 of the Code of Criminal Procedure, the judgment which the Magistrate records must contain the finding and the reasons for the finding, whatever the nature of that finding may be. The first part of section 227 discharges a Magistrate, in the case of a summary trial, from the necessity of recording the reasons for his finding in general, but clause (h) requires him to enter a brief statement of those reasons in the case of a conviction. We have no doubt that the Deputy Magistrate has fully complied with the requirements of the law, and for the reasons stated, we do not think it necessary to make any order in this case. If any sentence beyond that of fine had been passed, we might probably have thought it right, in the circumstances of the case, to mitigate that sentence. As it is, the fine of course has been paid by the employer, and we see no reason to interfere.

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In re  
DOWLAT  
SING.  
Judgment.

## [CRIMINAL JURISDICTION.]

1880  
April 7th.

No. 422 of  
1880.

DULA FAQUEER . . . . .

AND

BHAGIRAT SIRCAR AND OTHERS . . . . .

*Criminal Procedure Code, Act X of 1872, section 46.*

It is not competent for a Magistrate, to whom a case has been referred under section 46 of the Code of Criminal Procedure, to return the case to the referring Magistrate on the ground that in his opinion the latter has power to pass an adequate sentence.

All orders passed after a case has been so returned are illegal.

**C**RIMINAL REFERENCE under section 296 of Act X of 1872 submitted by the Magistrate of Mymensing.

The circumstances under which the reference was made were as follows :—

One Kahil Shahu Faqueer was the proprietor of a *Durga* and some moveable and immoveable property. On his death, his nephew, the complainant Dula Faqueer, succeeded to his property, both moveable and immoveable. The accused set up a false claim to that property, but as the complainant did not yield they forcibly entered the *Durga* on the night of the 27th September and maltreated the complainant.

The Deputy Magistrate of Kishoregunge, who had only second class powers, tried the case and convicted the accused under sections 452 and 147 of the Criminal Procedure Code. He then referred the case to the Magistrate under section 46 of the same Code, as he considered that the sentence which should be passed on the prisoners ought to be one of a severer nature than any he was competent to pass on them. After going through the record of the case, and hearing the pleader on the part of the accused, the Magistrate did not consider that the case was one calling for a sentence severer than that which the Deputy Magistrate was himself competent to pass. He, therefore, returned that case to the Deputy Magistrate for him to pass sentence.

After the record was so returned to him the Deputy Magistrate acquitted one of the accused Bhagirat Sircar, whom he had previously convicted. The Magistrate was of opinion that the Deputy Magistrate having once convicted Bhagirat Sircar was bound to pass some sentence on him, specially as no fresh evidence appeared to have been taken. He, therefore, referred the matter to the High Court.

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DULA  
FAQUEER  
v.  
BHAGIRAT  
SIRCAR.  
Judgment.

The judgment of the High Court (1) on the Reference was as follows :—

PRINSEP, J. :—

PRINSEP, J.

Having received this case under section 46 of the Code of Criminal Procedure, the District Magistrate was competent to "pass such judgment, sentence, or order as he desired proper and as is according to law." It was not competent to him to return the case to the Subordinate Magistrate; because, in his opinion, that officer could pass an adequate sentence. It is not necessary for us, therefore, to determine whether the Deputy Magistrate, who had originally convicted all the accused, could subsequently acquit one of them. We consider that all the orders passed, after the return of the case by the District Magistrate, are illegal and set them aside, and we direct that the District Magistrate do recall the case and pass such sentence or order as he may think right, taking into consideration any imprisonment that may have been undergone by any of the accused.

(1) PRINSEP and TOTTENHAM, J.J.

## [ORIGINAL CRIMINAL JURISDICTION.]

EMPRESS *vs.* BLECHYNDEN.

*Evidence Act (I of 1872) section 32—Statements by deceased as to cause of death.*

Where the accused was charged with culpable homicide not amounting to murder, the question was whether the deceased had died from the effects of a beating,

*Held*, that a statement by the deceased that he had been beaten by the accused was admissible in evidence under section 32 of the Evidence Act, without proof that at the time of making the statement the deceased was conscious of any fatal effect of such beating.

IN this case (which was a trial for culpable homicide not amounting to murder) medical evidence had been given tending to show that the deceased had died from the effects of a blow on the temple, where there was no external mark.

The case for the defence was that the prisoner Blechynden had given the deceased a slap on the Friday before his death, which happened on the following Thursday; but that he had not struck the prisoner on the Tuesday, the day on which, according to the case for the prosecution, the deceased was brutally beaten by the prisoner, and from the effects of which beating it was alleged that he died.

Evidence was now tendered by the prosecution under section 32 of the Evidence Act to show that the deceased had, on the Tuesday and Wednesday before his death, stated that the sahib had beaten him.

*Phillips* for the prisoner Blechynden contended that this evidence ought not to be received at this stage. The question whether the deceased died from the effects of a beating was one of the main points in dispute. The section could hardly have been intended to extend the English rule of evidence so far as to admit evidence of this kind. The English rule required that the statement should be made under the apprehension of impending death. Here the deceased had no apprehension of death, nor did the statements point to the particular blow which was alleged to have been given. There were cases in which the death undoubtedly happened

consequence of an affray, or was caused on the spot. In such cases the only question was who dealt the fatal blow? And the prisoner's statement that so and so gave him a certain blow, or gave him a certain beating, from the effects of which he undoubtedly died, might reasonably be admitted, although he might not be conscious of impending death. The English rule would exclude such evidence. The Evidence Act would admit it. But it should not be construed so as to admit a statement which did not point to any particular blow when he was not conscious of any fatal effect from such beating, and when only a *prima facie* case had been made of death resulting from a beating at all. The strict language of the section did not necessitate or warrant any such extension; and there was nothing in the Act to show that such an extension was intended by the Legislature.

WILSON, J., overruled the objection.

1880  
 EMPRESS  
 v.  
 BLECHYNDEN.  
 Judgment.

### [CRIMINAL JURISDICTION.]

IN THE MATTER OF DWARKA NATH BANERJEE PETITIONER.

Feb. 12th.

*Criminal Procedure Code (Act X of 1872), section 64—Procedure—  
 Transfer of Case.*

Where it appeared that the only officers in the district of P. otherwise competent to hear an appeal from a conviction for theft of property alleged to have belonged to the Road Cess Committee of the district, were, by reason of their connection with that Committee, interested in the result of the appeal, the High Court directed that the petition of appeal, together with all papers connected therewith, should be forwarded to the Sessions Judge of the 24-Pergunnahs to be dealt with as an appeal presented in his own Court.

THIS was an application under section 64 of the Code of Criminal Procedure, for an order that an appeal about to be presented by the petitioner Dwarka Nath Banerjee to the Magistrate at Purneah might be heard either by the High Court or the Sessions Judge of the 24-Pergunnahs.

The alleged circumstances under which the application was made were as follows:—On the 14th October 1878, Dwarka Nath

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 DWARKA  
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 BANERJEE.  
 Statement.

Banerjee entered into a contract with Mr. Hopkins, Magistrate of Purneah and Chairman of the Road Cess Committee to construct two masonry culverts, one at Binodpore and another at Chandwa, on a certain road in Purneah, known as Road No. 12, and for that purpose he made and burnt at his own expense two kilns of bricks at Binodpore. On the 17th April 1880 he received Rs. 135 from the Purneah Road Cess Committee which was described in the bill for the money as paid on account of certain materials supplied by Dwarka Nath Banerjee for 18,000 bricks.

In December last, Dwarka Nath Banerjee caused the removal of some bricks belonging, as he thought, to himself, which had been deposited by the side of the road at Chandwa. These bricks were the remainder of the bricks made and burnt by him. The District Engineer of the Purneah Road Cess Committee thereupon wrote a letter to the Magistrate of Purneah on the 20th December last complaining of the removal of these bricks, which, he alleged, belonged to the Road Cess Committee.

Subsequently a formal charge of theft of 1,000 bricks was preferred by the District Engineer against Dwarka Nath Banerjee and he was first put upon his trial before Mr. Pratt, Joint-Magistrate of Purneah. Mr. Pratt proceeded to try the case summarily, but in the course of the trial an objection was taken on the ground, amongst others, that Mr. Pratt, as Chairman of the Road Cess Committee, was not a proper person to conduct the trial.

In consequence of this objection, the case was made over to Mr. R. Perry, a Deputy Magistrate of the 2nd class, who on the 3rd instant convicted the prisoner of the offence of stealing 1,000 bricks, and sentenced him to two months' rigorous imprisonment and a fine of Rs. 50, and in default of payment a further term of 15 days' rigorous imprisonment.

The petition, upon which this application was made, alleges that the petitioner was anxious to prefer an appeal, and had already appealed to the Magistrate of Purneah, but he was apprehensive that his appeal may be summarily rejected before he had time to move the High Court for its transfer to or to any other Court. It then proceeded to allege that :



spondence in which a strong bias was evinced about the case had passed between Mr. Hopkins, the Magistrate of Purneah, and the prosecutor; that that gentleman was the Chairman of the Road Cess Committee, and therefore interested in the result of the appeal.

It further pointed out that the present Sessions Judge of Purneah, Mr. Cowley, was Joint-Magistrate and Vice-Chairman of Purneah Road Cess Committee, and subordinate to Mr. Hopkins at the time when the price of the bricks alleged to be stolen was said to have been paid, and a document purporting to be signed by Mr. Cowley, as Vice-Chairman of the Road Cess Committee had been put in by the prosecution as evidence of such payment.

It was submitted that having regard to the position of these gentlemen the appeal ought not to be heard at Purneah.

*M. Ghose*, and *Baboo Bhobun Mohun Dass*, appeared for the Petitioner.

The following order was made by

*WHITE, J.*, (*MACLEAN, J.*, concurring). :—

Under section 64 of the Code of Criminal Procedure, this Court directs that the Magistrate of Purneah do forward forthwith to the Sessions Judge of the 24-Pergunnahs the appeal of *Dwarka Nath Banerjee* when presented against the conviction and sentence, dated the 3rd instant, together with all the papers connected with the case. The Sessions Judge of the 24-Pergunnahs will deal with it as an appeal presented in his own Court. Let a copy of this order be sent to the Sessions Judge of the 24-Pergunnahs.

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NATH  
BANERJEE.  
Order.

## [CIVIL APPELLATE JURISDICTION.]

1880  
April 5th. J. ANDERSON (DEFENDANT) . . . . . APPELLANT  
AND  
No. 987 of JUGGODUMBA DABI (PLAINTIFF) . . . . . RESPONDENT  
1879

*Public Road—User of Road by Public.*

In order to establish that a road is a public road, it is sufficient that acts of user by the public are shown to have been acquiesced in by the owner of the land over which the road passes, and that those acts are of such a character as to warrant the inference that the owner intended to make over to the public the right to use the land as a highway.

**A**PPEAL from a decision passed by the Subordinate Judge of East Burdwan, reversing a decision of the Moonsiff of Raneeg.

In this case the plaintiff sued to restrain the defendant from using a certain road. The defendant's answer was, that the road was a public road, and that it had been used by the public, at least since the Equitable Coal Company, of which he was a manager, had used it upwards of twenty years as a passage for carts to the Railway Station.

The Moonsiff held that the road was a public road, and dismissed the plaintiff's suit. On appeal the Subordinate Judge held that the onus was upon the defendant to show that the road was a public road, or that the Company which he represented, had been in peaceful enjoyment of the road for twenty years, and as it appeared that the Company had used the road only from 1280, he reversed the Moonsiff's decision.

The defendant thereupon appealed to the High Court.

*Hill*, Mr. *Orr*, and Mr. *Simmons*, for the Appellant.  
Baboo *Taruck Nath Sen*, for the Respondent.

The following judgments were delivered by the Court (1):

WHITE, J. WHITE, J. :—

This suit was brought by the respondents (the plaintiff).

(1) WHITE and MACLEAN, J.J. •

the First Court) against the appellant, the defendant in the Court below, for the purpose, as the plaint states, of getting a cart road closed which passes over the plaintiff's land to Tapsi Railway Station, and which, it is alleged in the plaint, had been wrongfully opened and used by the defendant.

The defendant, who is the manager of the Equitable Coal Company, does not deny that he is using a cart road which passes over the land of the plaintiff, but in effect pleads, first, that the disputed road was a public highway for the passage of carts; and, secondly, that the Equitable Coal Company had acquired a prescriptive right of way over the plaintiff's land for the passage of the Company's carts, by an uninterrupted user as of right for upwards of twenty years.

The Moonsiff raised certain issues, of which the following are the material ones, viz., the 1st, whether the road in dispute is a public road, and the 4th, whether the defendants had an easement over the land for a cartway by enjoyment of it for more than twenty years. He found on the evidence, and after a personal inspection of the place, that the way in dispute was a public road. This finding rendered it unnecessary for him to enter into the question whether the defendants Company had the prescriptive right of way which was also claimed.

On appeal the Subordinate Judge reversed the decree of the Moonsiff. The grounds of the reversal is thus stated in the judgment:—"I do not find it is proved that the disputed road, as a public road, existed for more than twenty years, and the defendant had peaceable enjoyment thereof. On the contrary it is proved that after 1280, the defendant began to make use of this land for thoroughfare. This statement shews that the Subordinate Judge considered that he had only the question of 20 years user of the road by the defendant to deal with. So far as this question is concerned, the Judge's finding no doubt disposes of the plea of the defendant, founded upon a prescriptive right in the company, to use the road. It is not disputed that, until a comparatively recent period, and much within the twenty years before this, the Bengal Coal Company owned both the Colliery, now going to the defendant Company, and also the land, now going to the plaintiffs, and over which the road passes.

1880  
ANDERSON  
v.  
JUGGODUMBA  
DASI.  
Judgment.  
WHITE, J.

1880  
 ANDERSON  
 v.  
 JUGGODUMBA  
 DAB.  
 Judgment.  
 WHITE, J.

Whilst this unity of possession lasted no question of easement could arise; and, as the Equitable Coal Company date the user from the time that they acquired the Colliery, it is clear that their claim to a private easement in respect of the road must fail.

But it is equally clear that the Subordinate Judge has omitted to find upon the first issue raised by the Moonsiff, and that if his finding is to be treated as applicable to both issues that he has overlooked the different effect which duration of enjoyment has, upon the proof offered in support of a claim to use the road as one of the public, and a claim to use it as a private individual. The latter claim is merely to a private easement. The former is to an easement in favour of the public. In the first case a twenty years' enjoyment by the claimant must be proved. In the second case, no fixed period of enjoyment need be shown. It is sufficient if acts of user by the public are shown to have been acquiesced in by the owner or owners of the land over which the road passes, and that those acts are of such a character as to warrant the inference that the owner or owners intended to make over to the public the right to use the land as a public highway.

The law on this point cannot be expressed in better language than is found in Smith's Leading Cases, Vol II., p 152, 8th Edition *Dovaston vs. Payne*. Speaking of the mode in which a public highway is created the writer says:—

“Except where this is done by the express enactment of the legislature, it (viz a public highway) derives its existence from a dedication to the public by the owner of the land over which the highway extends, of a right of passage over it, and this dedication, though it be not made in express terms, as indeed it seldom is, may and will be presumed from an uninterrupted use by the public of the right of way claimed.”

Again, speaking of the evidence required to prove the existence of a highway when it is disputed, the writer says: “Eight, or even six years, have been held time enough wherein to prove the dedication from user. Four years have been held too short a time. But all depends upon the special circumstances of each case which will be understood from the remarks of CHAMBERLAIN.”

who says :—"No particular time is necessary for evidence of a dedication. If the act of dedication be unequivocal, it may take place immediately ;" and further down the writer remarks, "the duration of the public user, which limits the rights of the owner of the soil, is not so important in this respect as the nature of the acts done by the owner of the soil, and of the adverse acts acquiesced in by him, as well as the intention indicated by those acts."

I think, therefore, that it will be necessary to send this case back to the lower Appellate Court for the purpose of trying the following issue, whether there is a public road over the land in dispute for carts and carriages. In dealing with that question the Subordinate Judge will have regard to the remarks on the law, which I have cited from the above writer, and he will also bear in mind that he will have to consider what was done as regards the user of this road previously to the time when the plaintiff became the owners of the land over which the disputed road runs ; for, although no user of the road by the Bengal Coal Company for their own carts and carriages will avail the defendant's company on the defendant's plea of prescriptive right in that company to use the road, yet it is possible that the Bengal Coal Company itself might, whilst they were owners both of the colliery and the land now belonging to the plaintiff, have acquiesced in such acts of user by the public as that the dedication to the public of a right of way over the land for carts and carriages may be presumed.

Having regard to the fact that the claim in this case, though put forward by an individual, is a claim on behalf of the public, and which, if successful, will enure for the benefit of the public, and that the road in dispute terminates at one end in a Railway station, and affords a more convenient and easy access to that station, I think that the parties ought to be allowed to adduce such further evidence as they may be advised on the above issue.

The appeal will remain on the file of this Court, and the case will be remitted to the Court below to try the issue I have mentioned upon the evidence already on the record, or further evidence, if any, as shall be produced by the parties. The finding of the Judge will be returned to this Court for

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ANDERSON  
v.  
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DAHL.  
Judgment.  
WHITE, J.

1880

The costs of this hearing, and of the trial of the issue before the Court below, will be reserved.

MACLEAN, J. :—

I do not object to this order at the present stage of the case.

[CIVIL APPELLATE JURISDICTION.]

*April 6th.* NARAIN CUMARI (PLAINTIFF) . . . . . APPELLANT;  
AND  
RAM KRISHNA DAS (DEFENDANT) . . . . . RESPONDENT.

*Lease—Registration—Tabular Statement signed by a tenant—Evidence.*

A tabular statement, to which the tenants affixed their signature and which contains the year and date, the name of the tenant, the number of the holding, and the amount of rent for the several years, disbursements, and balance due is not a lease, and does not require to be stamped or registered—*Gungapersad vs. Gogun Singh*, I. L. R., 5 Cal., 322, followed.

**A**PPEAL from a decision passed by the District Judge of Cuttack, reversing a decree of the Deputy Collector of that District.

The defendant was alleged to be the Mustagir or Jummadar of five mouzahs, under the plaintiff. The suit was for arrears of rent on account of these villages for the years 1282 to 1283, and it was alleged that the defendant had taken a lease of these villages for the years 1281 to 1283 on a verbal agreement, to pay a specified rent at progressive rates for each year. The defendant admitted leasing four out of the five villages, but denied having made any agreement to pay the rent claimed, and asserted that the rents were much lower.

The plaintiff produced a tabular statement containing entries signed by the defendant, showing the amount of rent to be paid for each village in each year, the amount of disbursement, and the balance of rent due.

The Deputy Collector admitted this document, which was neither stamped nor registered, as collateral evidence of the verbal

contract, and as it bore out the plaintiff's case, he gave a decree for the whole amount claimed.

On appeal, the District Judge held that the tabular statement had been wrongly admitted in evidence, as, in his opinion, it came within the definition of a lease, and ought to have been stamped and registered. He accordingly reversed the decision of the Court of First Instance.

The plaintiff thereupon preferred a second appeal to the High Court.

*Baboo Jugdanund Mookerjee, Baboo Chunder Madhub Ghose, and Baboo Bussunt Bose, for the Appellant.*

*Baboo Umbica Churn Bose, for the Respondent.*

The judgment of the High Court (1), which was as follows, was delivered by

WHITE, J. :—

WHITE, J.

This was a suit brought by the Dowager Ranee of Burdwan against a tenant with whom she alleged that a verbal agreement had been made under which he took a jummadari of certain land in Assar 1281. The suit was for arrears of rent for the years 1282 and 1283. The defendant before us did not deny that he was her tenant, but disputed the extent of his holding and the rate of rent. The Moonsiff passed a decree in favor of the Ranee.

On appeal that decree was reversed by the Judge of Cuttack, not upon the merits, but on the ground that a certain document, which was contained in a book belonging to the zemindary of this ~~body~~, and which related to jumma bundee of the particular district, in which the respondent held the land in question, amounted to a lease, or an agreement for a lease, and not being stamped or registered, could not be used in evidence. We have had the document translated, and it appears to be in the form of a tabular statement containing in the first column the year and date, the name of the jummadar, that is the respondent, the number of the holding, and the amount of rent for the several years 1281, 1282 and 1283,

• (1) WHITE and MACLEAN, J.J.

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NARAIN  
CUMARI  
v.  
RAM  
KRISHNA  
DAS.  
Judgment.

1880  
 NARAIN  
 CUMARI  
 v.  
 RAM  
 KRISHNA  
 DAS.

Judgment.

WHITE, J.

the rent column of each year being sub-divided into the columns in which are inserted the jumma, or amount of rent, amount of disbursement and balance of rent, and in the 1 column appears the signature of the defendant. The document contains no particulars about the duration of the tenancy, nor any date affixed to the signature.

A verbal agreement was proved in the lower Court to have been made between the defendant and the lady's agent; and the document was put in evidence there to meet the defendant's objection about the extent of his holding and the rate of rent.

The lower Appellate Court have treated the document as lease, or agreement for a lease, and consequently held that he was not at liberty to admit the verbal evidence which was produced in the First Court.

I am unable to concur in the view taken by the Judge of the document. In my opinion it amounts to no more than an admission on the part of the defendant that the particulars set forth in the tabular statement are true, and consequently the document requires neither to be stamped nor registered.

In determining whether this document comes within the language of the Stamp Act, the Court has to consider whether the document produced is one which fairly falls within the description of any one or more of the documents there mentioned. If it does, it must be stamped, otherwise, it is not liable to be stamped.

The opinion which I have arrived at is supported by the decision of one of the Benches of this Court in a case reported in I. L. R., 3 Cal., 322—*Gungapersaud vs. Gogun Singh*.

There a very similar and, in all material particulars, an almost identical document was offered in evidence. The Judges held that it was admissible without a stamp; and when the reasons which induced the Court to come to that opinion, is examined, is the same as that given by me for my present decision, namely that the document only amounts to an admission. The instance of the document in question in no way excluded the evidence of the verbal agreement which was produced on the part of the Maharanee. The Judge in the lower Court says that, if the document is admissible, he should hold that the decision of



Deputy Collector on the merits was right. This expression of judicial opinion enables this Court to dispose of the case without a remand, and to restore the decision of the First Court. 1880

The appeal will be allowed with costs, and the appellant will also have her costs in the lower Appellate Court.

[CRIMINAL JURISDICTION.]

KRISHNO MONEE . . . . . February 5th.

AND

EMPRESS . . . . . No. 843 of 1879

*Confession—Criminal Procedure Code, Act X of 1872, sections 122 and 346.*

A confession made by an accused person before a Magistrate who has jurisdiction to deal with the matter to which it relates, may be made the commencement of a trial or enquiry under chapter XV of the Criminal Procedure Code, and be treated as a confession under section 346, whether or not the case be still under the investigation of the police.

*Per Curiam* :—The object of section 122 of the Code of Criminal Procedure is to enable any Magistrate, other than the Magistrate by whom the case is to be tried or enquired into, to record a confession promptly.

*Behari Hadji*, 5 C. L. R., 238, and *Reg. vs. Shirya*, I. L. R., 1 Bom., 219, discussed.

**A**PPEAL from a conviction and sentence passed by the Officiating Sessions Judge of Dacca.

The facts are stated in the judgment of the High Court.

Baboo Amerendro Nath Chatterjee, for the Appellant.

The judgment of the High Court (1) was as follows :—

The prisoner Krishno Monee has been convicted by the unanimous verdict of a Jury of having murdered her husband Huri Charan Kepali, and has been sentenced to death by the Sessions Judge of Dacca.

The evidence against her consists of the depositions of Guru Charan Kepali and Chundra Mohun Kepali, and her confession before the Deputy Magistrate of Munshigunge.

It appears that Huri Charan Kepali died on a Saturday in the

• (1) MORRIS and PRINSEP, J.J.

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 Judgment.

house of one Guru Dass Kepali. He had been removed the previous Tuesday in consequence of his having been with purging and vomiting, which he attributed to some mixed in the food, given to him by his wife on the previous day. There can be no doubt that the woman Krishno Monee was engaged on an intrigue with Lukhi Kant Kepali, and the sick death of Huri Charan are attributed to her, acting at the instigation of Lukhi Kant.

We have no medical evidence on the record except that of the Chemical Examiner, who has stated that he could find no traces of any poison in the stomach, sent to him.

Guru Dass Kepali deposes that Huri Charan was attacked with purging and vomiting; that he complained of burning in his stomach; and stated that he attributed the illness to "Panta Bât" given to him by his wife, the prisoner, the day, as at the time of eating he noticed the food to be very hot. His wife, the prisoner Krishna Monee, who was present at the time, said this, observed: "If you say anything about me, it will be well for you. I did not give you anything to eat, you say that I did"? She went to Guru Dass' house, but her husband was taken there, but she disappeared on the following day, and could not be found again until after his death.

Chundra Mohun, the other witness, similarly deposes to the illness of Huri Charan, and he states that the prisoner was fanning the deceased, and when asked, denied having administered to her husband. So far as this evidence goes we have only that Huri Charan exhibited symptoms which are similar to those caused by poison; that he died four days after taking the food; that he attributed his illness to the "Panta Bât" given to him by his wife; and that the intrigue between her and Lukhi Kant affords a probable motive for the crime. We have, in addition to this a full and circumstantial confession by the prisoner to the Deputy Magistrate of Munshigunge, that she committed her for trial by the Sessions Court, and this statement, which has been believed by the Jury, if it be received in evidence, amply corroborates the other evidence, and leaves no doubt that she did administer some poisonous vegetable to her husband.

But it is contended by the pleader that this statement cannot be received in evidence, because the Magistrate recorded it under section 122, and failed to comply with all the requirements of the law in having omitted to cause her to affix her mark or signature to it. In support of this the pleader relies on the well known case of *Reg. vs. Bai Ratan*, reported in 10 Bombay, 166.

It is argued that so long as a case is under police investigation, any confession made to a Magistrate is recorded by him, under section 122, Code of Criminal Procedure, and that it is not until the investigation has been completed, and the trial or enquiry under Chapter XV has commenced, that the statement of a prisoner can be taken under section 346. We are not prepared to agree in this view of the law, or to hold that the submission of the final report by the investigating police officer has such an effect on a Magistrate's proceedings as to limit his ordinary jurisdiction. Section 122 enables any Magistrate to take a confession, but if that confession be made before a Magistrate, who has jurisdiction to deal with the matter to which it relates, in the form either of a trial or of an enquiry under Chapter XV, he can, in our opinion, make that confession the commencement of such trial or enquiry, and so proceed under section 346. Section 342 allows a Criminal Court, in all enquiries and trials, to examine an accused person at any stage of the proceedings.

The Deputy Magistrate, who recorded the statement of the prisoner, was an officer in charge of a Division of the District. He was, therefore, clearly an officer who had full jurisdiction to deal with this case either under section 141 on a police report, if such report was made, and without any reference from another Magistrate, or of his own motion, under section 142, if he suspected that an offence had been committed.

The cases to which our attention has been directed do not appear to be at variance with this view of the law. In the case of *Reg. vs. Bai Ratan*, 10 Bombay, 166 (see page 174,) the learned Chief Justice who delivered the judgment of the Court particularly notices that the confession had been recorded by a Magistrate who had "not original jurisdiction either to commit or try the case, and who had not been deputed under section 115 as a Magistrate having jurisdiction to hold a preliminary enquiry

1880  
KRISHNO  
MONEN  
v.  
EMPRESS.  
Judgment.

1880  
 KRISHNO  
 MONER  
 v.  
 EMPRESS.  
 Judgment.

or otherwise to dispose of it. Accordingly the second class Magistrate only recorded the confession, the matter having been brought before him previously to the enquiry held by the committing Magistrate; and in the following page (175), his Lordship remarks that section 346, taken *per se*, would appear to apply only to examination of the accused, taken on enquiries (distinguished from investigations) and trials."

In the case of the *Empress vs. Munnoo Panioli*, 4 Calcutta Law Reports, 137, (S. C.) I. L. R. 4 Cal., 696, it was held that the statement of the prisoner was recorded under section 122, because the Magistrate who recorded it was at the time beyond the local limits of his jurisdiction. It is true that afterwards he conducted the preliminary enquiry within those limits, and committed the prisoner for trial before the Court of Sessions; but the Court considered that this circumstance did not alter the character of his previous proceeding which was taken by him when he was not in the exercise of his powers as a District Magistrate. This, speaking for myself, was the ground upon which my judgment in the case mainly proceeded.

The learned Judges, who decided the case of *Behari Hadji*, 5 C. L. R., 238, not only agreed entirely in the judgment of this Court in *Empress vs. Munnoo Panioli*, but were of opinion that section 122 applies to a confession made to a Magistrate other than the Magistrate by whom the case has to be enquired into or tried out, who may not even have jurisdiction to enquire into or try it. They add, no doubt, the words "and to a confession made while the case is still under investigation by the police, or before such investigation has commenced;" but we do not understand these words to refer to a confession made before a Magistrate who has jurisdiction, and who makes the enquiry into the case under Chapter XV. This appears more clearly from another passage, a little further on, in their judgment in which they say:—"It is not the common case of a prisoner confessing to the police in the course of their investigation, and being sent in at once to the nearest Magistrate for the purpose of having the confession recorded before he may have changed his mind regarding it."

There is, however, one case, that of *Reg. vs. Shivya*, I. L. R.

1 Bombay, 219, which seems to support the argument of the appellant's pleader. In it the confession was recorded by a third class Magistrate who afterwards committed the accused for trial by the Sessions Court. It seems, however, to have been admitted that he had recorded the confession of the prisoner under section 122. But it is not stated in the report of the case whether the Magistrate had power to hold the enquiry under Chapter XV without an order of reference from a superior Magistrate under section 44. The absence of full power to act as a Court of Original Jurisdiction may have prevented any proceedings save under section 122. We cannot, therefore, accept this case as an authority in conflict with the opinion which we have expressed.

1880  
KRISHNO  
MONEE  
v.  
EMPRESS.  
Judgment.

Police officers are required by law to send in an accused person not later than twenty-four hours after his arrest. It constantly happens that in nearly all serious cases it requires protracted investigation. The police officer is unable to send in his final reports under section 127, together with the evidence in the case until some days afterwards. It was not, we think, the intention of the Legislature that all confessions, recorded before the submission of this report, and the commencement of the trial or enquiry by the examination of the witnesses, should necessarily be governed by the provisions of section 122; such a rule would have the effect of limiting the powers which a Magistrate is ordinarily competent to exercise. It appears to us that the object of section 122 was to enable any Magistrate, other than the Magistrate by whom the case is enquired into or tried, and who is conveniently near at hand, to record a confession promptly. We hold, therefore, that this confession was not recorded under section 122 but under section 346, and we have no doubt that the omission of the attestation by her mark of the prisoner Krishno Moni on the record of her confession was not an error which has in any degree prejudiced her. Her statement, therefore, is receivable as legal evidence.

In this statement Krishno Monee describes how she gave her husband some vegetable substance, and how his sickness followed immediately; and she admits that in giving the drugs she intended to cause his death.

1880

Having regard, however, to the interval between the taking of the drug and the death of Huri Charan, and to the absence of all medical evidence, we think that a reasonable doubt may exist as to whether the death of Huri Charan is solely attributable to the act of the prisoner. In our opinion, however, it is abundantly clear that she is guilty of the offence of attempt to commit the murder of her husband. Accordingly we set aside the conviction under section 302, Indian Penal Code, and sentence of death, and in lieu thereof convict the prisoner Krishna Moni under section 307 of the Indian Penal Code, and sentence him to ten years imprisonment in transportation.

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[ORIGINAL CIVIL JURISDICTION.]

*April 1st.* A. B. MILLER . . . . . PLAINTIFF;  
 No. 586  
 of 1878. AND  
 A. BEER . . . . . DEFENDANT.

*Set off—Insolvent Act (Stat. 11 and 12, Vic. c. 21) section 39—Mutual credit—Civil Procedure Code, Act X of 1877, section 111.*

Where there is a debt due from an insolvent prior to his insolvency to another from whom there was a debt which was in dispute due to the insolvent, in a suit brought by the Official Assignee to recover the latter debt, the defendant is entitled under section 39 of the Insolvent Act, and 12 Vict., cap. 21, to set off the debt due from him to the insolvent against sums which may be claimed from him.

IN this case the plaintiff, as assignee of Messrs. Borradaile, Schiller and Co., insolvents, sued to recover from the defendant the sum of Rs. 25,963-7-0, as damages for the defendants' breach of eight several contracts with interest.

The defendants claimed to set-off a debt due from Messrs. Borradaile, Schiller and Co. to their firm of Messrs. Beer Reinhold and Co.

*Kennedy, Jackson, and Hill*, for the Plaintiff.

*Phillips and Stokoe*, for the Defendant.

*Kennedy* contended that if the case was entirely governed by section 39 of the Insolvent Act, which allowed a set-off only where there had been "mutual credit." Here there could be no set-off, for there had been no mutual credit—*Young vs. Bank of Bengal*, 1 Moore's I. A., 87.—See page 144.

1880  
MILLER  
v.  
BEER.  
—  
Judgment.

The principle, he urged, on which a set-off in insolvency had been allowed was, that where, but for the insolvency the dealings would have, according to binding mercantile usage, given rise to a right of set-off, it would have been hard that the intervening insolvency should have got rid of the right.

To prevent any hardship, section 39 seemed to have been introduced into the Insolvent Act. But this was only where there had been "mutual credit."

Section 111 of the Civil Procedure Code did not apply to the present claim of set-off, for Messrs. Beer Reinhold & Co. could not have brought a suit against the insolvents. Their only right was to prove in insolvency for their claim, and having proved their claim they could only receive a dividend on the amount proved; they could not recover the amount.

Illustration (b.) to section 111 of the Code shows this. The parties must fill the same character.

Mr. Justice Broughton gave a decree for Rs. 17,507-13, subject to a set-off of Rs. 6,094-15. As to the set-off the judgment of the Court was as follows:—

With regard to the set-off, it appears that on the 26th October 1877, Messrs. Beer Reinhold and Co. sold through Mr. F. Beer to Messrs. Borradaile, Schiller and Co. 100 tons of poppy seed at Rs. 5 a maund, of which 1,400 maunds were delivered but not paid for. The amount due by Messrs. Borradaile, Schiller & Co. prior to their insolvency was Rs. 6,094-15-0. It is contended by Mr. Kennedy there can be no set-off. This depends upon the construction to be put on the 39th section of the Indian Insolvent Act, 11 and 12 Vic. Cap. 21, which enacts that "When there has been mutual credit given to the insolvent, or any other person or persons, one debt or demand may be set against the other," that is to say, mutual debts may be set-off one against the other. Now, here there was a debt admittedly due from Messrs. Beer Reinhold and Co., to Messrs.

1880  
~

- Borradaile, Schiller & Co. ; the amount was in dispute, but the debt existed, and there was a debt due from Messrs. Borradaile, Schiller and Co. to Messrs. Beer Reinhold and Co. before insolvency, that the case falls within the principle laid down by GIBBS C.J., in the case of *Rose vs. Hart*, 8 Taunton, 499.

The case of *Young vs. Bank of Bengal*, 1 Moore's I. A., 87, not, I think, in point.

In that case there was a deposit of Government Securities for a specific purpose, and there was no mutual credit and no mutual debt.

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## [FULL BENCH.]

EMPRESS . . . . . 1880.  
April 16th.

AND

ANAUTHRAM SINGH AND OTHERS . . . . .

*Confusion—Criminal Procedure Code (Act X of 1872), sections 122 and 346.*

Two accused persons, on being arrested, were forwarded in custody to a Magistrate who had jurisdiction in the matter with which they were charged, and who afterwards conducted the preliminary enquiry, and committed them to the Court of Sessions. Before the Magistrate each made a confession, but neither of them attested his confession by his signature or mark.

*Held*, that the confessions, although the Magistrate had noted that they were taken under section 122 of the Code of Criminal Procedure, must be regarded as having been taken in the course of a preliminary enquiry, and that the provisions of section 346, allowing the evidence of the Committing Magistrate to be taken, applied.

*Per Curiam*.—Section 122 contemplates and provides for cases in which confessions are recorded by a Magistrate other than the Magistrate by whom the case is to be enquired into or tried.

**C**RIMINAL APPEALS from convictions and sentences passed by the Sessions Judge of Cuttack. There was also a reference by the Judge for confirmation of the sentences passed.

The appeals and reference were heard by Mr. Justice JACKSON and Mr. Justice TOTTENHAM, who referred the case to a Full Bench, with the following statement and expression of opinion:—

One Anauthram, with a woman named Tophia Bewah and others, were charged with a most brutal and atrocious murder, and were tried by the Court of Sessions of Cuttack. Anauthram and Tophia were convicted and sentenced to death, and their appeal is now before us. A third person, named Dariah Singh, was also convicted, and sentenced to transportation for life, and has appealed. The evidence for the prosecution was scanty, and was not of very good quality, and part of it consisted of two confessions made by the prisoners Tophia and Dariah, and recorded

1890  
**EMPRESS**  
 v.  
**ANAUTHRAM**  
**SINGH.**  
Statement.

by the Joint Magistrate, who afterwards committed all the prisoners for trial. Upon these confessions being tendered in evidence at the trial, it was objected on the part of the accused that they were not admissible, inasmuch as the Magistrate had omitted to annex to them the certificate prescribed by section 346, and also that they had not the signatures or marks of the accused. The form of certificate required by section 122 had been appended by the Magistrate, not to the vernacular record of the prisoner's statement, but to the note of it which he took simultaneously in English. It was also contended that the prosecution was not at liberty under section 346 to take evidence to prove that the prisoners had duly made the statement recorded, because it was said that this examination being taken under section 122, had not been taken in a preliminary enquiry. It was urged that the Joint Magistrate had not, up to that time, got the case properly before him upon his own file, and that he himself had given the strongest possible proof of the nature of his proceeding by entitling the confessions in the case of both prisoners as taken under section 122. The Sessions Judge, however, for the reasons stated in his judgment, came to the conclusion that notwithstanding the use of the words "section 122" by the Joint Magistrate, they were really examinations recorded under section 346, and therefore he allowed evidence to be given, showing that the prisoners had duly made the statements. The Sessions Judge arrives at this conclusion not without some hesitation, and he refers to decided cases which had been cited before him from 10 Bombay High Court Reports—*Reg. vs. Bai Ratan*—and also to a case in our own Court, 4 Calcutta Law Reports, page 137—*Empress vs. Panioli*. Since then there has been another decision by my brothers WILSON and TOTTENHAM, 5 Calcutta Law Reports, page 238, in the matter of *Behari Hadji*, in which the same point had been considered.

In regard to the case in 4 Calcutta Law Reports, entirely concur in the ruling of the learned Judges. There confession was recorded under section 122, before a Magistrate who, at the time when he recorded it, had no jurisdiction in the case. In the present instance, the facts were different.

inasmuch as the Magistrate who recorded the confessions had jurisdiction, and did himself conduct the enquiry from first to last, and eventually committed the accused to the Sessions. The questions which appear to us material, and which are of very great importance, are—*1stly*, Is not a confession, recorded by a Magistrate having jurisdiction, to be treated as an examination under section 193, notwithstanding that the prisoner or prisoners may have been brought before the Magistrate, before the conclusion of the Police investigation; and, *2ndly*, Is the examination to be excluded by reason of the absence of a certificate that it contains accurately the whole of the statements made by the accused person, although the certificate required by section 122 is forthcoming, and although the prisoner himself admits that the examination does contain the whole of his statement? We think these questions to be of such difficulty and importance that they ought to be decided by a Full Bench of this Court, and we refer the case accordingly.

We observe that the subject has also been considered in a still more recent case by MORRIS and PRINSEP, J.J., whose judgment commends itself to our approval—*Krishnomoni vs. Empress*, ante p. 289.

The decision of the Full Bench (1) was as follows :—

In the particular case out of which this reference arises, the prisoners Tophia and Dariah were arrested by the Police, and forwarded under custody to the Magistrate having jurisdiction, and made each a confession to him before the Police investigation was concluded (or at least before the report of the Police investigation was submitted.) The Magistrate who recorded their confessions was the Magistrate who conducted the preliminary enquiry and committed them for trial to the Court of Sessions; and not only had this officer jurisdiction to make the enquiry preliminary to commitment, but he had also the power to determine what Magistrate should conduct the enquiry. The Sessions Judge finds that "when the prisoners were sent up before him on the 17th, he had resolved to take up the preliminary enquiry himself," as indeed his duty required, but that

(1) GARTH, C.J., JACKSON, PONTIFEX, MORRIS and MITTER, J.J.

1880  
 EMPRESS  
 v.  
 ANAUTHRAM  
 SINGH.  
 Judgment.



1880  
 EMPRESS  
 v.  
 ANAUTHEAM  
 SINGH.  
 Judgment.

the formal order to that effect was not made till a few days later. The prisoners, as the Judge also points out, ceased to be in the hands of the Police from the time that they were brought before the Magistrate. Their confessions were recorded, and they were ordered to be placed in Hajut, and thereafter the preliminary enquiry, as it affected them, was carried on, and the Police investigation was at an end.

Under these circumstances we are of opinion that the confessions of these two prisoners must be regarded as having been made in the course of a preliminary enquiry, and not under section 122, Criminal Procedure Code, and that consequently the provisions of the last paragraph of section 346 apply. Section 122 contemplates and provides for cases in which confessions are recorded by a Magistrate other than the Magistrate by whom the case is enquired into or tried. When, therefore, as here, the Magistrate who recorded the confessions was the Magistrate who conducted the enquiry preliminary to committal and had jurisdiction so to do, such confessions cannot be treated as taken under section 122, nor can the circumstance of the Magistrate having noted, at the head of the confessions, that they were recorded under section 122, affect the matter. The case of *Empress vs. Munnoo Panioli*, 4 Cal. L. R., 137, does not conflict with this view; for, though the Magistrate who recorded the confession in that case subsequently conducted the preliminary enquiry, and committed the prisoner for trial, yet, at the time of recording his confession, he was outside the limits of his jurisdiction, and had no power to take up the preliminary enquiry. It seems to us, therefore, that the first question of reference, viz., whether a confession, recorded by a Magistrate having jurisdiction, is to be treated as an examination under section 193, notwithstanding that the prisoner or prisoners may have been brought before the Magistrate before the conclusion of the Police investigation, should be answered as we have done.

Holding this view the second question of reference does not arise, and need not be dealt with.

[CIVIL APPELLATE JURISDICTION.]

A. J. FORBES (PLAINTIFF) . . . . . APPELLANT; 1880.  
AND April 20th.  
BHUJLOO ROY (DEFENDANT) . . . . . RESPONDENT. No. 1527 of  
1879.

*Act VIII (B.C.) of 1869, section 28—Regulation XIX of 1873, sections 6, 9 and 10—Limitation.*

In a suit in a Civil Court a decree was obtained in 1863, declaring the land of the defendant "to be resumed and subject to assessment of revenue, the amount to be fixed by the Collector." *Held*, that the decree was conclusive; that the lands were not considered māl at the time of the settlement in 1790; and, further, that their resumption in 1863 did not create a tenancy, and that therefore section 28 of Act VIII (B.C.) of 1869 did not apply.

**APPEAL** from a decision passed by the Officiating Judge of Purneah, affirming a decree of the Officiating Moonsiff of Arrareah.

The plaintiff in this case brought a suit to assess certain lands declared assessable by a decree dated 13th January 1865, obtained in certain resumption proceedings. The suit was instituted on the 23rd March 1878. The Moonsiff held that it was barred by limitation.

The District Judge held that the decree in the resumption proceedings did not create as between the plaintiff and the defendant the relation of landlord and tenant, and that section 28 of Act VIII (B.C.) of 1869 did not apply. He accordingly affirmed the order of the Moonsiff.

In his judgment he relied on the following cases:—*Madhub Chunder Bhudro vs. Mohima Chunder Mozoomdar*, 12 W. R., 442, and *Ranee Shama Soonduree Debia vs. Seetul Khan*, 15 W. R., 374. The plaintiff appealed to the High Court.

**Mr. C. Gregory, for the Appellant.**  
**No one appeared for the Respondent.**

**The judgment of the High Court (1), which was as follows, was delivered by**

**MACLEAN, J.:—**

The plaintiff appellant brought a suit in the Civil Court of <sup>MACLEAN, J.</sup>

(1) WHITE and MACLEAN, J.J.

1880  
 FORBES  
 v.  
 BHUJLOO  
 BOY.

*Judgment.*

MACLEAN, J.

Purneah, on some date not apparent in the proceedings, obtained a decree, which declared the defendant's land to be liable to assessment by the revenue officer. The decree is dated 1st January 1863.

The present suit was brought on 23rd March 1878 in Moonsiff's Court, for the purpose of fixing the rate of rent payable by the defendant. Both the lower Courts have dismissed the suit as barred by Article 130, Schedule II, Act of 1877 (Limitation Act).

The lower Appellate Court's judgment is based upon the following considerations :—*1st.*—That the defendant in the suit decided in 1863 set up a title of lakheraj grant prior to 1790 A.D. *2nd.*—That the decision of 1863, declaring the land to be *mâl* did not create a relation of landlord and tenant, and that therefore section 28 of Act VIII (B.C.) of 1869 did not apply.

The whole question turns upon the finding of the Civil Court in 1863, and the terms of that finding are these :—

“Decreed that the land in dispute is resumed, and subject to assessment of revenue; the amount of revenue is to be fixed by the Collector.”

This distinctly indicates that the land was not part of the permanently-settled estate in 1790, but was held under an invalid grant or grants, and it is therefore land to which sections 6 and 9 of Regulation XIX of 1793, apply. Had it been land to which section 10 of the Regulation applied, the result would have been, that the defendants continued to occupy the lands as tenants, and section 28 of Act VIII (B.C.) 1869 would have preserved the plaintiff's right to sue for assessment, but the decision that the lands were assessable by the Collector is conclusive that the lands were considered *mâl* at the time of the settlement in 1790, and the resumption in 1863 did not create a tenancy.

As for the date of the alleged grants, there is no ground for assuming that any grant subsequent to 1790 was set aside. It is clear that grants existed prior to 1790, but those grants afforded no protection.

The decision of the District Judge seems to be correct, and the appeal must be dismissed with costs.

## [CIVIL APPELLATE JURISDICTION.]

HUBO SUNDARI DABIA AND OTHERS (PETITIONERS) . . . . . } APPELLANTS ;

AND

CHUNDER KANT BHUTTACHARJEA } RESPONDENTS.  
AND ANOTHER (OBJECTORS) . . . . . }

1880  
May 14th.

No. 5 of  
1879.

*Succession Act (X of 1865), section 50—Attestation of Wills—Registrar,  
Admission of Execution of Will before.*

Where a testator admits execution of a Will before the Registrar, if the witnesses attesting that admission sign their names in the presence of the testator, their attestation will be a sufficient compliance with the requirements of section 50 of the Succession Act, and will remedy any defects in the original attestation of the Will.

**REGULAR APPEAL** from a decision passed by the District Judge of Rangpore.

This was an application for probate of the Will of one Tara Sundari Dabia, deceased.

It appeared that both the attesting witnesses signed the Will before the testatrix. The District Judge held that the Will was improperly attested, and dismissed the application.

The Will had been registered.

The petitioners appealed to the High Court against the decision of the District Judge.

Baboo *Eshwur Chunder Chuckerbutty*, for the Appellants.

Baboo *Grija Sunker Mozoomdar*, for the Respondents.

The judgment of the High Court (1), which was as follows, was delivered by

GARTH, C.J. :—

GARTH, C.J.

We think that in this case the Judge was quite right in holding that the attestation at the foot of the Will was insuffi-

(1) GARTH, C.J., and MITTER, J.

1880  
 HURO  
 SUNDARI  
 DABIA  
 v.  
 CHUNDER.  
 KANT BHUT.  
 TACHARJEA.

*Judgment.*

GARTH, C.J.

cient, because it is proved that both the witnesses signed the names before the Will was signed by the testatrix. We agree with the learned Judges who decided the case of *Bissonia Dinda vs. Doyaram Jana*, 5 C. L. R., 565, and also with the Bombay case—*Fernandez vs. Alves*, I. L. R., 3 Bom., 382, the was cited—that section 50 of Act X of 1865 clearly intends that the two witnesses shall sign their names after the testator or testatrix shall have signed his or hers.

But then there is the further point, which has been argued here, and to which the attention of the Judge does not appear to have been directed, namely, that when the testatrix admitted before the Registrar her execution of the Will, she was identified on that occasion by one of the same persons, who profess to have witnessed her signature to the Will.

Upon her admitting before the Registrar that the signature to the Will was hers, the Registrar signed his name as attesting her admission, and apparently the other witness did the same.

Now if these persons signed their names *in the presence of the testatrix*, as attesting her own admission that she had signed the Will, we think that would be sufficient as an attestation to satisfy the requirements of the 50th section.

We have decided, therefore, to remand the case, in order that the Judge, by recalling the witness, who has already been examined, Chandra Kishore, and also any other witnesses who were present, may satisfy himself upon this point, and determine the case accordingly.

We find that the view we now take was adopted by Mr. Justice PHEAR in a case reported in I. L. R., 1 Cal. 150—*In the goods of Roymoney Dossee*.

As the appellant did not raise this contention in the Court below, and as upon the materials now before us he would not be entitled to succeed, we think that the objector should have his costs in this Court.

Both parties will be at liberty to adduce fresh evidence bearing upon the question, which we direct to be tried.



## [CIVIL APPELLATE JURISDICTION.]

TUPONIDHI DHIRJ GIR GOSSAIN } APPELLANT;  
 (PLAINTIFF) . . . . . }

1880  
 April 8th.

AND

SRIPUTI SABANI (DEFENDANT) . . . . . RESPONDENT.

No. 277 of  
 1878.

*En Judicata*—Jurisdiction—Competent Jurisdiction—Estoppel—Civil Procedure Code, Act X of 1877, section 13.

A suit having been brought in the Moonsiff's Court to establish the plaintiff's title, as cheela and heir of a late Mohunt, to certain land in respect of which that Court had jurisdiction, a subsequent suit was instituted by the plaintiff who was unsuccessful in the former suit, in the Court of the Subordinate Judge, against the same defendant to establish the same title to the entire estate of which the land, the subject-matter of the suit before the Moonsiff, formed portion. The value of the entire estate was beyond the jurisdiction of the Moonsiff.

*Held*, that the Moonsiff's Court was a Court of competent jurisdiction within the meaning of the Civil Procedure Code, Act X of 1877, section 13; and that, on the authority of *Krishna Behary Roy vs. Brojeswari Chowdhranee*, L. R. 2 I. A., 283, the suit before the Subordinate Judge could not be maintained.

*Per MACLEAN, J.* :—The decision of the Moonsiff as to the title of portion of the land claimed is conclusive as between the parties as to every portion of land held under the same title—See *Nund Kishore vs. Hurree Pershad Mundul*, 13 W. R., 64.

**A**PPPEAL from a decision passed by the Subordinate Judge of Cuttack.

The facts were as follows :—The appellant, who was the plaintiff in the Court below, brought this suit in the Court of the Subordinate Judge of Cuttack against the respondent, who was the defendant there to be confirmed in the possession of certain lakheraj, resumed and other lands in Mouzah Bonlaug, and a cutcherry house there; and also to recover possession of a considerable amount of other property, of which he stated that he was dispossessed on the 18th of June 1868. He alleged that the lands and property, the subject of the suit, were his ancestral and self-acquired property of a certain Mohunt,

1880  
 TUPONIDHI  
 DHIRJ GIR  
 GOSWAMI  
 v.  
 SRIPUTY  
 SARASL

Statement.

Tuponidhi Jugroop, who died on the 13th of Assar 1274 (27th September 1866), and he claimed the whole property on the ground that he was the cheela and heir of the deceased Mohunt. He valued the entire property for the purposes of the suit at upwards of a lakh of rupees.

The defendant in his written statement denied the title of the plaintiff, as cheela and heir of the deceased Mohunt, and alleged that he, the defendant, was the person who really fulfilled those characters, and he further pleaded that the plaintiff was estopped from setting up the title upon which he sued, inasmuch as his alleged title had already formed the subject of adjudication by a competent Court, and been determined adversely to the plaintiff.

It appeared that in 1871 a suit before the collector was brought by the respondent under Act X of 1859 against one Anund Beharee to recover from him rent for the years 1276-77 Amlī, in respect of 10 guntas 9 biswas of land occupied by him. That land formed part of a 13-anna share of Mouzah Nagpore, formerly the property of the deceased mohunt Tuponidhi Jugroop.

In that suit the appellant intervened, under section 77 of Act X of 1859. The Collector, however, passed a decree against Anund Beharee in favour of the respondent.

The appellant thereupon brought a suit (No. 40 of 1872) on the 16th December 1871, against Anund Beharee and the respondent, "to set aside the order of the Collector by determination of his, the plaintiff's, title to the 10 guntas 9 biswas of land," which was the subject of the rent suit. He alleged that the 13 annas share of Mouzah Nagpore belonged to him as heir and cheela of Tuponidhi Jugroop. This was specifically denied by the respondent, who asserted that he, the respondent, was the heir and cheela of the deceased mohunt.

The Moonsiff held that the allegation in the plaintiff's statement was correct, and that the appellant had been in possession as proprietor of the 13 annas share in Mouzah Nagpore, which included the land then in dispute, and he accordingly passed a decree in his favour.

On an appeal being presented, this decree was set aside on the 8th August 1872 by the Officiating Judge of Cuttack, who dismissed the suit, and on further appeal to the High Court the decision of the Judge was upheld on the 17th June 1873.

The appellant then brought the present suit in the Court of the Subordinate Judge of Cuttack. The Subordinate Judge, on the authority of *Krishna Behary Roy vs. Brojeswari Chowdhranee*, L. R. 2, I. A., 283, dismissed the suit on the ground that the question at issue was already *res judicata*.

The plaintiff then appealed to the High Court.

*Branson*, Baboo Mohesh Chunder Chowdhry, Baboo Hem Chunder Banerjee, and Baboo Umbica Churn Bose, for the Appellant.

Baboo Annoda Persad Banerjee, Baboo Obhoy Churn Bose, Mr. R. E. Twidale, and Baboo Chunder Madhub Ghose, for the Respondent.

*Branson*.—This appeal is governed by Act X of 1877, as amended by Act XII of 1879, and I contend that the question of title in the present case cannot be said to have been “directly and substantially in issue” in the former suit before the Moonsiff, within the meaning of section 13 of the Code so amended.

The words “directly and substantially in issue in the former suit” have been substituted for “heard and determined by a Court of competent jurisdiction.” The Legislature, therefore, must be taken to have considered that there was a difference between cases where the matter in issue had been heard and determined in a former suit without being directly and substantially in issue, and cases where the matter in issue had been directly and substantially in issue in a former suit, and to have laid down that in future it should only be in the latter class of cases, that the judgment in the former suit should be an estoppel.

Here the former suit was for the rent of portion only of the estate which is now sued for. The plaintiff ought not to be

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prevented by the decision in that suit from bringing the present suit to establish his title and get possession of the whole estate—*Kasheenath Bose vs. Sharoda Soonduree Chowdhraini*, 19 W. R., 97. See *Moni Roy and Mussainut Rajbunsee Kooer*, 25 W. R., 393.

The case of *Boistub Churn Sen vs. Nahee Ram Sen*, 15 W. R., 32, is analogous to the present case. There a Revenue Court, for the purposes of a rent suit, had held that a particular kabulent was genuine, and it was held that the decision of the Revenue Court was not a bar to a Civil Court subsequently trying the question of the validity of the same kabulent. That was a case decided under the old law, and the Revenue Court was competent to try the question of the validity of the kabulent. See also *Ram Dhun Ghose vs. Ishan Chunder Ghose*, 18 W. R., 30; *Takaimi Goura Coomaree vs. Bengal Coal Co.*, 13 W. R., 129; and *Geroo Churn Sircar vs. Brijnath Dhur*, 24 W. R., 111.

The matter in issue in the present case is the title to the whole estate. It cannot be said that the title to the whole estate was directly and substantially in issue before the Moonsiff; and if it were not, the present suit, according to the law as it now stands under section 13 of the Code, as amended by Act XII of 1879, is not barred.

See *Sulahmunissa Khatoon vs. Mohesh Chunder Roy*, 16 W. R., 85; *Hurrihur Mookerjee vs. Ooma Moyee Dossia*, 12 W. R., 525.

The amendment in section 13 of the Code was made necessary in consequence of the decision in the case of *Gobind Chunder Koondoo vs. Taruk Chunder Bose*, I. L. R., 3 Cal. (F. B.) 145, and similar cases. See *Doorga Persad Singh vs. Doorga Koonwari*, I. L. R., 4 Cal., 191.

Again, I contend that the Court of the Moonsiff was not a Court of competent jurisdiction. The competency of the Court must be tested with reference to the matter in issue in the second suit—See section 13 of the amended Code. Now, as already stated, the matter in issue in the present suit is the title to the whole estate. That title never was, and could not have been in issue in the Court of the Moonsiff, and the decision of the Moonsiff is not legally a bar to this suit.

*Baboo Annoda Pershad Banerjee*.—It cannot be said that the issue, whether the plaintiff in the suit before the Moonsiff was a cheela or not, was an incidental issue, for in that suit, as in the present suit, the plaintiff could only succeed by showing that he was a cheela of the deceased Mohunt. The plaintiff is therefore estopped in the present suit—*Soorjomonee Dossee vs. Suddanund Mohapatter*, 12 B. L. R., 394; and *Krishna Behary Roy vs. Brojeswari Chowdhranee*, L. R. 2, I. A., 283.

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The object of the Legislature in inserting the words “directly and substantially” in the amended Code was to prevent matters which were not directly and substantially in issue in a former suit being pleaded in bar. Here the sole question is, whether the plaintiff was a cheela of the late mohunt, and that question was the real issue in the suit before the Moonsiff.

An intervenor in a rent suit was held to be barred by the decision against him in such suit, when he afterwards brought a suit to establish his title to the land the rent of which he had claimed—*Gobind Chunder Koondoo vs. Taruck Chunder Bose*, 1 L. R., 3 Cal. (F.B.) 145.

The suit before the Moonsiff was not for rent merely, but for the land itself. That appears from the plaint (Paper Book, p. 36.) But even if it be considered to have been a suit for rent only the effects is the same—See *Soorjomonee Dossee vs. Suddanund Mohapatter*, 12 B. L. R., (P.C.) 300; and *Krishna Behary Roy vs. Brojeswari Chowdhranee*, L. R., 2 I. A., 283.

[MACLEAN, J.—There is a case in 13 W. R., 64—*Nund Kishore Singh vs. Hurree Pershad Mundul*—in which it was held that where the question of the plaintiff's title is raised and decided in a suit for possession of land, the decision is conclusive between the parties as to every portion of land held under that title. There is, however, the contrary decision, already referred to, in the same volume—*Tekaitni Goura Coomaree vs. Bengal Coal Co.*, 13 W. R., 129.]

The case of *Mohidin vs. Muhammad Ibrahim*, 1 Mad. H. C. R., is similar to the former case. There a decision in ejectment proceedings, in respect of one of ten houses, that a mortgage was pleaded was not genuine, was held to be a bar to a subsequent foreclosure suit, in respect of the remaining nine

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houses, on the same mortgage. See *Sri Rujub Kakurlapud vs. Chellamkuri*, 5 Mad. H. C. R., 176; *Llewellyn vs. Lala Sham Sundur Sahoy*, 2 Shome's Report, 50.

[MACLEAN, J.—The case of *Kishen Dhur Nundee vs. Bhookol Polly*, 9 W. R., 461, is against you. There it was held that the dismissal of a suit for a declaration of the plaintiff's right to receive rent from a tenant of a portion of an estate could not be pleaded as an estoppel in a suit to establish the plaintiff's general right as proprietor of the whole estate.]

[WHITE, J.—It seems to me this case depends chiefly on the competency of the Moonsiff's Court. In one sense it was not a competent Court to try this case, by reason of the value of the land, but on the other hand, it was competent to try what the title to the land here claimed was, and it did adjudicate upon that title with reference to part of the land.]

A competent Court is one which is competent to try the issue before it, whether or not the decision upon that issue may affect property outside the jurisdiction of the Court. See *Pran Nath Sandyal vs. Ram Coomar Sandyal*, 2 C. L. R., 33, and *Gobind Chunder Koondoo vs. Taruck Chunder Bose*, 1 C. L. R., 35, (S.C.) I. L. R., 3 Cal. (F. B.) 145. The latter case was followed in the case of *Bemolasoondery Chowdhraim vs. Pancham Mitter*, I. L. R., 3 Cal., 705. See also Regular Appeal 98 of 1876, decided by AINSLIE and BROUGHTON, J.J., 6th September 1876, unreported, and Regular Appeal 319 of 1877, decided by the same Judges, 14th May 1879.

The plaint distinctly states that the cause of action in respect of the entire property arose on the 18th June 1877, when the plaintiff was dispossessed. Under section 48 of the Code, if they could have brought his suit for the whole estate on that date, he cannot now sue for the remainder. See *Moonshee Buzloor Ruheem vs. Shumsoonnissa Begum*, 11 Moore, I. A., 551.

Mr. R. E. Twidale followed on the same side.

Branson, in reply, referred to the case of *Rughooram Bismar vs. Ram Chunder*, W. R. Full Bench No., 127, as showing, that although Small Cause Courts have jurisdiction to try questions of title which incidentally arise in suits cognizable by them, their judgments are not conclusive, except so far as they relate to the

regard to the right to relief claimed in the suit. He referred also to *Mussamut Edun vs. Mussamut Bechun*, 8 W. R., 175, contending that in order that the decree in a former suit should be an estoppel to a subsequent suit in another Court, the two Courts must be of concurrent jurisdiction.

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The judgments of the High Court (1) were as follows :—

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It appears that in 1871 the defendant's tehsildar brought a suit on behalf of his master in the Collector's Court under Act X of 1859, against one Anund Behary, to recover from him rent for the years 1276-77 Amli, and also damages for its detention in respect of 10 gunts and 9 biswas of land, occupied by Anund Behary, and forming part of a 13-anna share of Mouzah Nagpore, claimed by the defendant as a portion of the estate belonging to him as heir of the deceased Mohunt. In that suit the plaintiff intervened under section 77 of the foregoing Act, which allows an intervention where the intervening party has actually, and in good faith, received and enjoyed the rent before and up to the time of the commencement of the suit. The Collector has no authority under that section to enquire into the title of the rival claimants to the suit, but must decide the suit, so far as they are concerned, according to the result of his enquiry as to whether the intervening party was before, and at the commencement of the suit, in actual receipt and enjoyment of the rent. But the section also contains a proviso that the decision of the Collector shall not affect the right of either party who may have a legal title to the rent to establish his title by suit in the Civil Court, if instituted within one year from the date of the decision. The plaintiff's intervention was unsuccessful; and the Collector, on the 9th of October 1871, passed a decree against Anund Behary in favour of the defendants' tehsildar for Rs. 12-8-4-8.

On the 16th of December 1871 the plaintiff filed in the Moonsiff's Court at Puri a plaint against the tenant Anund Behary, and also against the present defendant and his tehsildar,

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alleging that the 13-anna share of Mouzah Nagpore was his ancestral property and in his possession, and that after the death of his guru, viz., the deceased Mohunt, he had collected the rents from the ryots in that mouzah, and stating that the suit was brought "to set aside the order of the Collector of the 9th of October 1871 by determination of his, the plaintiff's, title to the 10 gunts 9 biswas of land," the subject of the rent suit. He valued the last-mentioned land at Rs. 17-7-10-2, which, as appears from his schedule of valuation, was made up of Rs. 5-4-6 stated to be the approximate value of these lands, and of Rs. 12-3-4-8 the amount of the Collector's decree.

The present defendant, on the 7th of February 1872, put in his written statement to that suit, in which he denied that the plaintiff ever was in possession of the 13-annas share of the mouzah, or had any title to the same, and alleged that the title and possession was in himself. The defendant also specifically denied that the plaintiff was the cheela and heir of the deceased Mohunt, and alleged that he the defendant was the cheela and heir, and as such was in possession. On the 13th of March 1872 the Moonsiff settled several issues, and amongst them this:—"Was the plaintiff, as the cheela and heir of Mohunt Jugroop, deceased, in possession as proprietor and in receipt of rent of the 10 gunts and 9 biswas through the tenant Anund Behary; or is the present defendant in possession of the entire 13 annas of Mouzah Nagpore as heir and cheela of the deceased Mohunt, and as such collected rent from the tenant Anund?"

Upon this issue the Moonsiff found that "it was satisfactorily proved that the plaintiff was the real cheela and heir of the deceased Mohunt, and was also in possession as proprietor of the 13-annas of Mouzah Nagpore, which included the land in dispute, and was also in receipt of rent from the tenant Anund Behary, and accordingly made a decree in the plaintiff's favour. The defendant appealed from this decree to the Officiating Judge of Cuttack, who, on the 8th of August 1872, after examining the evidence adduced by the plaintiff, found that the plaintiff was not, as he alleged, the cheela of the deceased Mohunt Jugroop, and accordingly dismissed the suit.

Although the Officiating Judge limits his finding to the cheela-



ship of the plaintiff, yet I think it must be treated as a finding against the plaintiff's heirship as well. The Judge, in commencing his examination of the plaintiff's evidence, expressly states that he is dealing with the issue on the merits, which is the issue in the Moonsiff's Court recited above. The plaintiff had also in his plaint based his heirship on the allegation that he was a cheela, and his claim was resisted by the defendant on the ground that he was not a cheela.

Against this decision the plaintiff preferred to this Court the only appeal which he could prefer, viz., a special appeal which, on the 17th of June 1873, was dismissed with costs. Inasmuch as the decree of the lower Appellate Court was based on its finding upon the evidence against the plaintiff, it was a decree which could not be disturbed in special appeal, unless the plaintiff could show that the decision was bad on one or other of the grounds set forth in section 372 of the old Code Act of 1859, which he must have failed to do.

In the present suit the Subordinate Judge of Cuttack, considering that the result of the above litigation between the plaintiff and the defendant had finally decided the question of heirship to the deceased Mohunt adversely to the plaintiff, and also that upon the authority of *Krishna Behary Roy vs. Brojeswari Chowdhranee*, L. R. 2 I. A., 283, the matter was *res judicata*, has dismissed the plaintiff's suit.

The plaintiff does not appear to have excluded from his present suit the 10 guntas and 9 biswas of land which formed the subject of the litigation commenced in the Moonsiff's Court. As regards that portion of the deceased Mohunt's estate he must unquestionably be held to be concluded by the issue of that litigation; and that this was so was not disputed on behalf of the appellant. But as regards the residue of the estate the appellant argues, 1st, that under Act X of 1877 (the Civil Procedure Code, as amended by Act XII of 1879,) the question of the heirship of the appellant was not *directly* in issue in the suit in the Moonsiff's Court. That suit, he contends, was only to establish his title to the rent of a small portion of the deceased's estate, whilst the present suit relates to the entire estate, and seeks for a confirmation of his possession of a portion of that estate, and

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for khas possession of the remainder, and that in the former suit the question of heirship came only indirectly and collaterally before the Court.

The prayer of the appellant's plaint in the Moonsiff's Court appears to claim, under his alleged title as heir, possession of the 10 gunts and 9 biswas of land; but reading the prayer by the light of the statements in the body of the plaint, and of the issue settled by the Moonsiff, to which reference has been made, I think that what the appellant really sought was to establish his legal title to the rent. The suit was brought within a little more than two months after the decision of the Collector, and may fairly be considered as a suit of the class mentioned in the proviso of section 77 of Act X of 1859. Whether that suit, however, was brought to establish his title to the land or the rent, appears to me to make no difference. His title to either rested on the same basis, and the same issue would have to be tried, viz., whether the appellant was cheela and heir of the Mohunt.

In the present suit also the right to any relief depends entirely upon his having this issue determined in his favour. The groundwork of the decision in the suit in the Moonsiff's Court is the same as what, if the present suit succeeds, must be the groundwork of the decision in the Subordinate Judge's Court, and the same evidence to establish the appellant's heirship as was given in the Moonsiff's Court, must be given again before the Subordinate Judge of Cuttack.

I am unable, therefore, to see that the matter directly in issue in this suit was not also directly in issue in the suit in the Moonsiff's Court.

The next objection taken is, that the Moonsiff's Court was not a Court of *competent* jurisdiction within the meaning of section 18 of the Code as amended. It is argued that, as the Moonsiff was not competent to try a suit for the recovery of the whole estate of the deceased Mohunt, or to entertain a suit for a declaration of the appellant's title to the whole estate as heir of the deceased Mohunt, by reason of the estate exceeding in value the Moonsiff's jurisdiction, the Moonsiff's Court ought, therefore, not to be treated as competent to decide finally the question of the plaintiff's heirship.

It is to be observed that the Moonsiff decided the suit in favour of the appellant, and found that he was the real cheela and heir, and that it is the Court of the District Judge which, reversing that decree on appeal, has in effect found that the appellant was not the heir. If, therefore, this suit could be considered as one instituted in the District Judge's Court, there is no question but that that Judge was competent to try a suit for the entire estate, and the question now raised would fall to the ground. But in considering the competency of a Court for the purpose of deciding upon a question of *res judicata*, we must, I think, look to the powers of the Court in which the suit was instituted, and not to the powers of the Court by which that suit was decided on appeal.

I must confess that, if I were unfettered by authority, I should be inclined to hold that the Moonsiff's Court, although competent to try the issue of heirship for the purpose of arriving at a conclusion upon a matter wholly within its jurisdiction, viz., the right to rent of the 10 guntas 9 biswas of land, was yet not competent to find upon that issue, so as to make it *res judicata* in a suit instituted in a Court of superior jurisdiction and relating to a large estate whose value is far beyond the pecuniary limits of the Moonsiff's jurisdiction. I am much impressed with the judgment of PEACOCK, C.J., in *Mussamut Edun vs. Mussamut Bechun*, 8 W. R., 175, 179. The learned Chief Justice there lays it down that concurrency of jurisdiction in the two Courts is a necessary part of the rule which creates the estoppel "known as *res judicata*," and that in order to make the decision of one Court final and conclusive in another Court, it must be the decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive. One exception no doubt exists, but it was probably not referred to in the case cited, because it was thought to be unnecessary for the purposes of the judgment. The exception is that the judgment of the inferior Court is conclusive upon a matter actually decided by that Court. The learned Chief Justice in the case cited bases his judgment upon the answers given by the Judges in the Duchess of Kingston's case, and he

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points out that, if the question of the concurrency of the jurisdiction of the two Courts is treated as immaterial, the whole procedure as regards appeals might be entirely changed.

In the present case the appellant succeeded in the Moonsiff Court, but had his suit dismissed in the Appellate Court; and if the issue of heirship is treated as *res judicata*, the title which he claims to a large estate, asserted to be of the value of more than a lakh of rupees, will have been finally decided without his being able to have the opinion of the High Court upon the merits of his title, and without having a right to appeal to the Privy Council. No doubt little sympathy will be felt for the plaintiff, inasmuch as he brought himself into the difficulty in which he is placed, by choosing to sue in the Moonsiff's Court, to establish his legal title to the rent of an insignificant portion of the deceased Mohunt's estate instead of bringing a suit in the District Court in the first instance to recover the whole estate. But I can easily suppose the case of a party who is in actual possession of a large estate, but is dragged into the Moonsiff's Court as a defendant in a suit brought by a rival claimant who sues a tenant of the estate for the rent of a few fields, and is met by the defence that the rent is payable to the party who is in possession of the rest of the estate. If the rival claimant succeeds in the Moonsiff's and District Judge's Courts, or fails in the first and succeeds in the second Court, upon an issue of title to the estate, the rival claimant can, by availing himself of the doctrine of *res judicata*, force the other party out of the remainder of the estate, and the defeated party will be thus deprived of a large property—it may be of the value of several lakhs of rupees—without being able to procure the judgment either of this Court, or of the Privy Council on the merits of his title.

There are numerous decisions of this Court relating to the question of *res judicata*, but in none of these, except two, the Court, as far as I can gather the facts from the reports, dealing with the judgments of Courts, other than a Court of concurrent jurisdiction.

In two cases, however, the judgments of an inferior Court deciding an issue, which was the foundation of the plaintiff's

in their suits brought in a superior Court, were unquestionably held to be conclusive in the latter. The first case is of *Nund Kishore Sing vs. Hurree Pershad Mundul*, 13, 64. It is not a case easy to understand, as reported, appears to have been a regular appeal against a decree Subordinate Judge declaring that the plaintiff had a right in an entire village, and directing that he should possession. The defendants, who were the appellants before High Court, amongst other defences, contended that the suit was *judicata* and therefore barred by section 2 of the Code 59, because in a former suit brought by the plaintiff Moonsiff's Court against the appellants for cutting some and dispossessing him of some jungle land, pertaining mouzah, an issue was raised as to the plaintiff's title to mouzah as putneedar, which issue the Moonsiff declined but the Judge, on appeal, tried and decided against the plaintiff. MARKBY, J., in giving the judgment of the Court,—"At the same time we wish it to be clearly understood even had the plaintiff been able to show that he had a right of action separate and distinct from that in the former suit, we do not think it at all follows that the plaintiff is not have been concluded by the previous decisions. Having heard the argument on that point, we desire to express our entire concurrence in the decision of the High Court of Madras in the case of *Mohidin vs. Muhammad Ibrahim*, 1 H. C. R., 245, which is in point. The land now claimed, the land which the plaintiff sought to recover in the former suit, is all held under one title. The whole question of plaintiff's putnee title was raised, and decided in the former suit and we consider that decision conclusive between these parties as to every portion of land held under that title. On this ground also, therefore, we think the suit ought to be dismissed."

The second case is reported in I. L. R., 3 Calcutta 705,—*Bemolasoondery Chowdhraim vs. Panchanun Choudhary*, in which a similar decision is given. There the plaintiff had successfully intervened in a rent suit brought in Moonsiff's Court by the plaintiff against a tenant of a

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portion of the land in dispute in the second suit, and the defendants succeeded in establishing their right as against the plaintiff. The second suit was brought by the plaintiff against the same defendants, in the Court of the Subordinate Judge, to get possession of a half share of several villages which the plaintiff claimed under the same title as he had put forward in the Moonsiff's Court. The Subordinate Judge dismissed the suit brought in his Court. This Court, to which the plaintiff had appealed, affirmed the decision of the lower Court, and in the course of their judgment said:—"Another bar to the entertainment of this suit is the prior adjudication recognizing the title of the defendants in the suit of *Saroda Gobind Chowdhry and others vs. Komul Ghose*. In that suit the plaintiffs chose to intervene, and the question of title, as between them and the defendants, was distinctly raised and determined. They are, therefore, estopped under the ruling of the Full Bench in *Gobind Chunder Koondoo vs. Taruck Chunder Bose* (reported in I. L. R., 3 Cal., 145) from setting up this title now. This principle is also recognized in the new Code of Civil Procedure, s. 18, expl. II." In both these cases a decision on the question of *res judicata* appears to have been unnecessary, as the Courts considered that there were other sufficient grounds in the one case for reversing, and in the other case for affirming, the decrees appealed against. In each case the Court, in passing their decision on the foregoing question, relied upon authorities, which, when examined, appear not to touch the question of concurrency of jurisdiction. In the Madras case, cited by Mr. Justice MARKEY, *Mohidin vs. Muhammad Ibrahim*, 1 Mad. H. C. R., 245, both the suits seem to have been brought on the Original Side of the High Court. In the Full Bench case cited by KEMP, J., both the suits appear to have been instituted in the Moonsiff's Court.

These circumstances diminish the authority of these cases, but there remains the Privy Council decision referred to by the Subordinate Judge of Cuttack, which shows that concurrency of jurisdiction is not necessary to raise the estoppel. In *Krishna Behary Roy vs. Brojeswaree Chowdhraee*, L. R., I. A., 283, the appellant and plaintiff had brought a suit in

the District Judge's Court of Rajshahye to set aside the adoption of the respondent. The appellant had previously intervened in a suit which the respondent had brought in the Court of the Principal Sudder Ameen to set aside certain putnee leases granted by his adoptive mother. The ground of the intervention was, that the appellant was the heir, and that the respondent had no title as adopted son. The issue was tried and found against the intervenor, and in favour of the adoption. The District Judge held that the appellant's suit was barred by reason of the judgment in the former one. A special appeal was preferred to the Court which, upon such an appeal, was not competent to go into the evidence, and the decree was affirmed. The Judicial Committee upheld the decision of this Court, thus holding that the Court of the Principal Sudder Ameen, although a Court of inferior jurisdiction to that of the District Court, was a Court of competent jurisdiction. The case in the Privy Council was decided upon section 2 of Act VIII of 1859 (the first Code of Civil Procedure); but the words in that section, relating to the competency of the Court in which the former suit is heard, remain the same in the new Code; and the amending Act has made no attention in this respect.

The doctrine laid down by PARSONS, C.J., was not referred to in any of the cases which I have cited, nor, so far as anything appears in the reports, was brought to the notice of the Courts which decided their cases. Notwithstanding this, I think I am bound by the decision of the Privy Council which, having the facts before it, expressly decides the appeal of Krishna Behary Roy on the ground that the main issue which he sought to have tried in his suit had already been determined by a Court of competent jurisdiction.

I must hold, therefore, that the Moonsiff's Court was a Court of competent jurisdiction within the meaning of section 18 of the Code as amended. This case was argued on both sides on the hypothesis that the Code, as amended by Act XII of 1879, governed the case. The decree appealed from was passed on the 1st of August 1878. It is not necessary to determine whether the case is really governed by the Code, as amended, or by the law as it stood in 1878; inasmuch as the 13th section as amend-

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ed, if it really differs in meaning from the 13th section as it stood before the amendment, is the more favorable of the two to the appellants' contention, and inasmuch as I hold that even under the section as amended the appellant's suit cannot be maintained.

The appeal is dismissed with costs.

**MACLEAN, J. MACLEAN, J. :—**

I concur in dismissing this appeal, and in holding that the suit is barred under section 13 of Civil Procedure Code, X of 1877.

The suit No. 40 of 1872 was brought by the present plaintiff in consequence of an unfavourable decision in a rent suit under Act X of 1859, and instead of bringing it to establish his right to the rents, as provided by section 77 of that Act, he brought it to establish his possessory right to the lands. He valued the suit at Rs. 5-4-6 for the land, and Rs. 12-3 for the rent, and he based his claim upon his position as cheela and heir of a deceased Mohunt who died in 1868. A dispute had at that time arisen between the plaintiff and defendant as to the succession to the Mohuntship, and various proceedings, of which the rent suit was one, had taken place between them relative to the succession. In his plaint in the present suit the plaintiff alleges that since 1868 he has been "gradually" dispossessed by the defendant of most of the properties held by the former Mohunt; and I have no doubt that when the suit No. 40 of 1872 was brought, the plaintiff had a cause of action for a considerable portion of the property. He chose, however, to confine that suit to a small portion of the property, and to put in issue his title as cheela and heir of Jugroop Gir Gossain. The defendant objected to the suit proceeding, but joined issue with him upon the question of title, and I am satisfied that that question was one which, in the words of section 13 of Act X of 1877, exp. II, ought, under the circumstances in which the defendant was placed, to have been made "ground of defence," and it was, therefore, directly and substantially in issue in the suit No. 40 of 1872.

It may be that the Court in which that suit was instituted was a Court which could not have tried the suit, brought to assert a title to the entire estate of Jugroop Gir Gossain; but



I have stated the plaintiff elected to put his title in issue in a Court of limited jurisdiction, and to sue for a small portion of the estate when, in point of fact, his title and possession of much more than that suit involved had been challenged and disturbed; and, for my part, I believe that the plaintiff was endeavouring to obtain, as hinted by the District Judge, a cheap decision as to his claim to a very large estate. It is very probable, therefore, that a plea under section 7 of Act VIII of 1859 would have been a sufficient answer to this suit. No such plea, however, has been raised, and we are only dealing with the plea of estoppel, and I have stated my opinion that the *issue* now raised was raised and decided in the suit of 1872.

As to the competency of the Moonsiff to deal with a question of title to land worth Rs. 5-4 there can be no question; and I concur in the opinion that the decision on that title is conclusive between the parties as to every portion of land held under that title—*Nund Kishore Singh vs. Hurree Pershad Mundul*, 13 W. R., 64. Were it otherwise a number of suits might be brought in Courts of limited jurisdiction for portion of an estate, and the party in possession, who may have successfully defended his title in each or all of them, might be harassed by a further suit for the whole estate in a Court of exclusive jurisdiction.

In my opinion the decision relied upon by the Subordinate Judge, reported in L. R., 2 I. A., 283,—*Krishna Behary Roy vs. Brojeswari Chowdhranee* applies to this case, and the suit cannot be maintained.

Appeal will be dismissed with costs.

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## [PRIVY COUNCIL.]

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March 13th.

MONIRAM KOLITA . . . . . APPELLANT ;  
AND  
KERRY KOLITANI . . . . . RESPONDENT.

*Hindu Law—Widow's Estate, Forfeiture of—Unchastity during widowhood.*

Under Hindu Law, as administered in the Bengal School, a widow, who has once inherited the estate of her husband, is not liable to forfeit that estate by reason of her subsequent unchastity.

[Judgment of the High Court affirmed.]

**A**PPEAL from a decision passed by a Full Bench [Couch, C.J., KEMP, JACKSON, PHEAR, MACPHERSON, MARKBY, GLOVER, D. N. MITTER, AINSLIE, and PONTIFEX, J.J.] dated the 9th April 1873 of the High Court of Calcutta.

The case was referred to the Full Bench by BAYLEY and D. N. MITTER, J.J., on the 10th April 1872.

The judgment of the Full Bench will be found reported in 13 B. L. R., 1.

*Cowie, Q.C.*, and *Doyme*, for the Appellant.

No one appeared for the Respondent.

The judgment of their Lordships of the Judicial Committee (1) of the Privy Council was as follows :—

This is an appeal from a decision of a Full Bench of the High Court of Judicature at Calcutta. It was admitted by virtue of a special order of Her Majesty in Council, whereby the appellant had leave to appeal in the form of a special case upon the following questions, viz. :—*1st.*—Whether, under the Hindu Law, as administered in the Bengal School, a widow who has once inherited the estate of a deceased husband is liable to forfeit that estate by reason of unchastity; and, *2nd*, whether the forfeiture, if it is barred by Act XXI of 1850.

The appeal was admitted on account of the importance of

(1) Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE SMITH, and Sir ROBERT P. COLLIER,

questions submitted for determination, and the great interest which the Hindu community take in it.

The case came in the first instance upon special appeal before a Division Bench, consisting of Mr. Justice BAYLEY and Mr. DWARKANATH MITTER, who were of opinion that the defendant had, by reason of unchastity, forfeited her right in her husband's property, but in consequence of a contrary ruling of the High Court referred the two questions above mentioned to a Full Bench, with their remarks thereon.

The Full Bench consisted of the Chief Justice and nine other Judges, and the majority held that the widow having once inherited the estate, did not forfeit it by reason of her subsequent unchastity. Three of the Judges, however, viz., Mr. Justice KEMP, Mr. Justice GLOVER, and Mr. Justice MITTER, dissented from the opinions expressed by the majority of the Court. The case is fully reported in 13 Bengal Law Reports, p. 1.

The subject has been very elaborately discussed by the Chief Justice and other Judges of the Full Bench, and it has also been fully argued before their Lordships on behalf of the appellants. The respondent did not appear.

The opinion of Mr. Justice MITTER, who was himself a learned and accomplished Hindu lawyer, and these of the other two Judges, who were in the minority, are entitled to very great weight; but having considered and weighed all their arguments, their Lordships are unable to concur in the opinions which they expressed. Their earliest case in which the subject was fully discussed in the High Court, is the case of *Matangini Debi vs. Srimati Jaykali Debi*, 5 B. L. R., 463, which was the cause of the reference.

That case was originally tried before Mr. Justice MARKBY, who delivered a judgment in which he showed much research and great knowledge of the subject. The case was appealed to the High Court, and heard before the then Chief Justice and Mr. Justice MACPHERSON, who affirmed the judgment of Mr. Justice MARKBY. Their Lordships will, in the first instance, revert to the judgments of the dissentient Judges, and in particular to the opinion expressed by Mr. Justice MITTER, on hearing the case, and to his judgment after the argument in

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the Full Bench. Reasoning from the general notions of the Hindu commentators touching the frailty and incapacity of women, and the necessity for their dependence upon, and control by, some male protector, and from the origin and nature of a widow's interest in the property which she takes in succession to her husband, he arrived at the conclusion that she is, as he expressed it, a trustee for the "benefit of her husband's soul"; that inasmuch, as by reason of unchastity subsequent to her husband's death, she becomes incapable of performing effectually the religious services that are essential to his spiritual welfare, she ceases to be capable of performing her trust, and must, therefore, be taken to have broken the condition on which she holds the property, and to have incurred the forfeiture of her estate. It may be remarked that the other two dissentient Judges differed from Mr. Justice MITTER's view of the nature of a Hindu widow's estate, and, therefore, from a good deal of the reasoning upon which his conclusion is founded. But, however that may be, their Lordships entirely concur with the Chief Justice and the majority of the Judges in rejecting the somewhat fanciful analogy of trusteeship.

Mr. Justice GLOVER's judgment is founded upon the express texts, and upon the ground that by reason of unchastity a widow becomes incapable of performing those religious ceremonies which are for the benefit of her husband's soul. He draws a distinction between a widow and a son, and says (Report, p. 55):—"The theory of the Hindu law of inheritance is the capability by the heir of performing certain religious ceremonies which do good to the soul of the departed, and he takes who can render most service. The sons down to the third generation could do most, offer most oblations, and confer greatest benefits, therefore they are first in the line of heirship. The widow comes next, as being able to confer considerable, though less, benefits, and it is only because she is able to do this that she is allowed to take her husband's share.

"It would seem, therefore, to be a condition precedent to her taking that estate, that she should be in a position to perform the ceremonies and offer the continual oblations, which would benefit her deceased husband in the other world; and in the

respect her position is very different from that of a son. The son confers benefits upon his father from the mere fact of being born capable of performing certain ceremonies. His birth delivers him from the hell called "put;" and whether in after-life he offers the funeral oblations or no, he succeeds to his father's inheritance from the fact of being able to offer them. With the widow it is not so; she can only perform ceremonies and offer oblations so long as she continues chaste, and directly she becomes unchaste from that moment her right to offer the funeral cake ceases."

These reasons do not appear to be sufficient to support the learned Judge's conclusion that a widow forfeits her estate when she ceases to be able to perform the necessary religious ceremonies. It is admitted that she may, by law, hold the estate without performing them, and that she may give, sell, or transfer the estate to another for her own life. Nor does there appear to be any sufficient reason for the distinction attempted to be drawn between a son or other heirs, and a widow with reference to the forfeiture of the estate, when the person, who has succeeded to it, has become incompetent to perform the duties which he or she ought to perform. The proprietary right of a son, by inheritance, from his father is expressly ordained, because the wealth devolving upon sons, benefits the deceased (Dayabagha, Chap 11, a. 1, v. 381,) and the right of succession of other heirs to the property is also founded on competence for offering oblations at obsequies (18th verse). See also verse 32. But a son, even if by the mere fact of his birth he delivers his father from the hell called "put," is, according to the Dayabagha, excluded for certain causes from inheritance in the same manner as other heirs (see the Dayabagha, Chap. 5, paras. 4, 5 and 6); but if he once succeeds, the estate is not divested for anything less than degradation, though causes, which would have excluded him if they had existed before succession, arise after the estate has descended. This is admitted by Mr. Justice MITTER, (Record, p. 7). Their Lordships will proceed to consider the principal points upon which the learned Judges, who were in the minority, made their judgments.

Mr. Justice MITTER, in his judgment, (p. 40) says:—"Of all

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the authorities above referred to, the Dayabagha of Jimuta Vahan the acknowledged founder of the Bengal school, is undoubtedly the highest, and it is, therefore, to the Dayabagha that I sha first direct my attention. I do not wish, however, to go over all the texts quoted and relied upon by the author of the treatise in discussing the widow's right of succession. I will refer to two of those texts only,—namely, the texts of Vrihas Menu, cited in v. 7, section 1, chap. XI of Mr. Colebrooke's translation of Dayabagha; and that of Catyayana, cited in v. 56 of the same section and chapter. These two verses are as follows:—

- (1)—‘The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share.’
- (2)—‘Let the childless widow, keeping unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property, until her death; after her let the heirs take it.’ ”

With regard to the former of the texts, above cited, although the present participle is used, it clearly refers only to the conduct of the widow up to the time of her husband's death, and not to her conduct subsequently. It cannot mean up to the time of her presenting the funeral oblation; for notwithstanding the order of the words, the meaning of the text is, that having obtained the husband's share, the patni or widow should perform those ceremonies conducive to the spiritual benefit to her husband and herself, which can be accomplished by wealth, and which a female is competent to perform. See the Vira Mitrodaya, chap. 3, pt. s. 2, and the Smriti Chandrika chap. 11, s. 1, vs. 13, 16 and 24. In this view the text would run thus: “The widow of a childless man having kept unsullied her husband's bed, and persevered in religious observances, shall obtain his entire share, and present his funeral oblation.”

Mr. Justice GLOVER points to the words “persevering in religious observances,” to prove that the whole text applies to a period subsequent to the husband's death, and as such

to a continually abiding condition, because he assumes that a wife cannot perform religious observances during her husband's life, and that, therefore, those words must have relation to a period after her husband's death. But the assumption does not appear to be correct, for in the Smṛiti Chandrika, Chap. 11, s. I., v. 17, the meaning of the words "persevering in religious observances" are thus explained, "practising religious ceremonies even during the lifetime of the husband with the husband's permission," &c., whence the inference is drawn in verse 18, that the patni, to inherit her husband's estate, must be a pious woman. And again in verse 12, a virtuous woman is "one that lives with her husband, associating with him in the performance of rites ordained by Śruti and Smṛiti, and observing fastings and other religious ceremonies."

The second of the texts relied upon is that of Catyayana.

It is important to see for what purpose the text was cited, and with that view to refer to the verses immediately preceding those in which the text is cited, for there is nothing more likely to mislead than to read a single paragraph from the Dayabagha or Mitakshara alone, without studying the whole chapter, and, in some cases, even without studying several chapters of the same treatise.

In chap. 11, s. I., the author of the Dayabagha, verse 54, sums up his argument in support of the widow's right to succeed to the entire property of her husband for which purpose he had cited the text of Vrihat Menu. He says:—

"By the term his share is understood the entire share appertaining to her husband, not a part only (the translator adds the words 'sufficient for her support'). And then in verse 55 he concludes:—"Therefore, the interpretation of the law is right as set forth by us, viz., that the widow's right must be affirmed to extend to the whole estate of her husband (verse 6)."

He then proceeds in verse 56 to deal with the mode of enjoyment, and to show that notwithstanding a widow takes the entire estate, she is not entitled to make a gift, sale or mortgage of it to the exclusion of her husband's heir. He says:

But the wife must only enjoy her husband's estate after his death; she is not entitled to make a gift, mortgage or sale of

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it." And then in support of that proposition, he refers to the second text cited, and proceeds :—

"Thus Catyayana says :—Let the childless widow preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her death let the heirs take it !"

Mr. Justice MITTER in his judgment remarks, at p. 41, that the author of the Dayabagha cited that text, not for the purpose for which he cited that of Vrihat Menu, viz., that of establishing a widow's right to succeed to the entire estate of her deceased husband, but for that of defining the nature and extent of the interest which devolves upon her by virtue of that right.

In his remarks made on referring the case, however, he reasons upon it as an isolated text, and says (Report, p. 16) :—"This passage shows clearly, not only that the widow's right is a mere right of enjoyment, the word enjoyment being understood in the sense explained above, but that the exercise of that right is absolutely dependent on her preserving unsullied the bed of her lord. The participial form of the word "preserving," that is continually preserving, which is also the form used in the original (Palayanta) proves conclusively that the injunction is one in the nature of a permanently abiding condition, which a widow is bound at all times, and under all circumstances, to satisfy ; and the right of enjoyment conferred upon her being expressly declared to be subject to such a condition, every violation of it must necessarily involve a forfeiture of right."

Mr. Justice GLOVER, also, at page 57, expresses a similar opinion, and he refers to the present participle, "preserving," as denoting continuance, and as referring to the time after the widow has taken the property originally, and he adds besides, if the words "keeping unsullied" refers only to past time, what is to be made of the other part, which he assumes to import a condition, viz., "living with her venerable protector." "She cannot," he says, "live with him until she is a widow, and while she lives with him she is to keep unsullied her husband's bed." It is by treating the words "living with her venerable protector" as constituting a condition that he endeavours to add force to his argument



that the words "keeping unsullied the bed of her lord" also expresses a condition. But that argument fails, inasmuch as it has been expressly held by the Privy Council in the case of *Cassinauth Bysack vs. Hurrooondry Dossee*, Vyavastha Darpana, 97, and 2 Morley's Digest, 198, that the words "abiding with her venerable protector" do not create a condition of forfeiture in case of her refusing to abide with him. Referring to that decision Mr. Justice MITTER says that it lends, in an indirect way, considerable support to his view, inasmuch as that particular case was decided expressly upon the ground that the widow had not changed her residence for unchaste purposes. Their Lordships, however, are of opinion that the words "abiding with her venerable protector" do not, under any circumstances, create a condition, or a limitation of a widow's right to enjoy the property of her husband to the period during which she abides with her protector.

They agree with the Chief Justice in the opinion which he expressed at p. 82, that neither the words "preserving unsullied the bed of her lord," nor the words "and abiding with her venerable protector," import conditions involving a forfeiture of the widow's vested estate; but even if the words were more open to such a construction than they appear to be, their Lordships are of opinion that what they have to consider is not so much what inference can be drawn from the words of Catyayana's text taken by itself, as what are the conclusions which the author of the *Dayabagha* has himself drawn from them. It is to that treatise that we must look for the authoritative exposition of the law which governs Lower Bengal, whilst on the other nothing is more certain than that in dealing with the same ancient texts, the Hindu Commentators have often drawn opposite conclusions. Now, how has Jimuta Vahana dealt with this particular text? It has been seen for what purpose he cited it; but how does he comment on it in the rest of the section in which it occurs? His comments on the words "venerable protector" (Vol. LVII); he defines who are intended to take after the demise of the widow under the term "the heirs" (Vols. XXXVIII and LIX); he states at her duty to lead an abstinent, if not an ascetic life, to avoid "waste" (Vols. LX and LXI), and deals with her

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power of alienation, and the limitations upon it (Vols. LXII, LXIII, and LIV). But he nowhere says one word from which it can be inferred that, in his opinion, the text implied continued chastity as a condition for the duration of her estate, or that a breach of chastity subsequent to the death of her husband would operate as a forfeiture of her right. It can scarcely be supposed that a Commentator, so acute and careful as Jimuta Vahana, if he had drawn from the text of Catyayana the inference that a widow was to forfeit the estate, if she should become unchaste after her husband's death, would not have stated that inference clearly by saying in verse 57, "let her enjoy her husband's estate during her life, or so long as she continues chaste," instead of using only the words "during her life," and stating that "when she dies" the daughters and others are to succeed. The right to receive maintenance is very different from a vested estate in property, and, therefore, what is said as to maintenance cannot be extended to the case of a widow's estate by succession. However, the texts cited in regard to maintenance show that when it was intended to point out that a right was liable to resumption or forfeiture, clear and express words to that effect were used. Jimuta Vahana in chap. 11, s. 1, v. 48 of the Dayabagha refers to a text of Nārada, in which he says:—"Let them allow a maintenance to his women for life, provided they keep unsullied the bed of their lord, but if they behave otherwise, the brother may resume that allowance." How different are those words from those used in the text of Catyayana. Mr. Justice MIRZA, in order to get rid of the argument that a daughter becoming a sonless widow or unchaste after having succeeded to the estate of her father, does not forfeit the estate, argues that the texts to which he refers are applicable to a daughter as well as to a widow, and he refers to verse 31, s. 2, chap. 11 of the Dayabagha to show that the text of Catyayana is applicable to all women. (See Report, pp. 45 and 46, 48 and 49).

It seems clear, however, that though an unchaste daughter is excluded from inheriting her father's estate, or an unmarried mother that of her son, it is not by virtue of either of the above mentioned texts of Vrihat Menu or of that of Catyayana.

Those texts have reference to the bed of the deceased owner of the estate. The words, "his funeral oblation" and "his share," and "the property," have reference to the oblation, the share and the property of the lord or husband mentioned in the preceding parts of the texts, whose estate is to be inherited, and not to the husband or lord whose estate is not to be inherited, such as the husband or lord of a daughter or mother, as the case may be, of the deceased owner, who in default of a widow may be next in succession to inherit his estate.

Verse 31, s. 2, chap. 11 only extends to other women the rule applicable to a wife, that a gift, sale, or mortgage of the estate is not to be made, and that after her death the heirs of the deceased owners are to take, and not that part of the rule which is included in the words "keeping unsullied the bed of her lord." This is made clear by section 30, in which it is said:—"Since it has been shown by a text cited (section 1, verse 56) that on the decease of the widow in whom the succession had vested, the legal heirs of the former owner, who would regularly inherit his property, if there were no widow in whom the succession vested, namely, the daughters, and the rest succeed to the wealth; therefore, the same rule (concerning the succession of the former possessor's next heirs) is inferred *à fortiori* in the case of the daughter and grandson (meaning a daughter's son), whose pretensions are inferior to the wife's."

Then comes section 31, which is in the words following: "The word 'wife' in the text above quoted (section 1, verse 56) is employed with a general import, and it implies that the rule," (meaning the rule referred to in chap. 11, s. 2, and para 30) "must be understood as applicable generally to the case of a woman's succession by inheritance."

Their Lordships have dwelt at some length upon the two texts that have been considered, since it is upon them that the arguments of the dissentient Judges are mainly founded. For the reasons above stated, they are of opinion that these texts neither expressly, nor by necessary implication, affirm the doctrine that the estate of a widow, once vested, is liable to forfeiture by reason of unchastity subsequent to the death of her husband.

The judgments of the High Court have so exhaustively reviewed

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the later authorities upon this question that their Lordships do not think it necessary to go through the same task. It is sufficient to say that, in their opinion, those authorities, though in some degree conflicting, greatly preponderate in favour of the conclusion of the majority of the Judges of the High Court.

In their Lordships' view it has not been established that the estate of a widow forms an exception of what appears to be the general rule of Hindu law, that an estate, once vested by succession or inheritance, is not divested by any act which, before succession or incapacity, would have formed a ground for exclusion of inheritance. The general rule is stated in the *Vira Mitrodaya*, a book of authority in Southern India (see 13 Moore's Ind. Appeals, p. 466, and Mr. Colebrooke's Preface to the *Dayabagha*), and which may also, like the *Mitakashara*, be referred to in Bengal in cases where the *Dayabagha* is silent. It is there said, in para. 3 of the chapter, on exclusion from inheritance (chap. 8), "amongst them, however, an outcast (*patita*) and addicted to vice (*upa patak*) are excluded if they do not perform penance," and then in para. 4 "the exclusion again of these takes place if these disqualifications occur previously to partition (or succession), but not if subsequently to partition (or succession) for there is no authority for the resumption of allotted shares." In para. 5 it is said that the masculine gender in the word "outcast," &c., is not intended to be expressive of restriction, and that the law of exclusion, based upon defects, excludes the wife or the daughters, female heirs as well.

Mr. Justice JACKSON has ably pointed out the great mischief, uncertainty and confusion that might follow upon the affirmation of the doctrine that a widow's estate is forfeited for unchastity, particularly in the present constitution of Hindu society, and the relaxation of so many of the precepts relating to Hindu widows. The following consequences may also be pointed out.

According to the Hindu law, a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship (as to which see *Shiragunga* case, 9 Moore's Ind. Appeals, 604) does not

were life estate in the property. The whole estate is for the time vested in her, absolutely, for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant-at-will. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband, but whatever her estate is, it is clear that until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs of her husband (Id. 604). The succession does not open to the heirs of the husband, until the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of the husband if he had lived up to, and died at the moment of, her death (Moore's Indian Appeals, 400.)

If the widow's estate ceases upon her committing an act of unchastity, the period of succession will be accelerated, and the title of the heirs of her husband must accrue at that period. Suppose a husband dies leaving no male issue, and no daughter, mother, or father, but leaving a chaste wife, a brother, a nephew, the son of the surviving brother, and other nephews sons or deceased brothers. The wife succeeds to the estate, and the surviving brother is her protector (see Dayabhaga, chap. 11, s. 1, v. 57). If he survive the widow, he, according to the Bengal School, will take the whole estate as sole heir to his deceased brother, and the nephews will take no interest therein, for brothers' sons are totally excluded by the existence of a brother (Dayabagha, chap. 11, s. 1, v. 5; Id. chap. 11, s. 6, v. 1 and 2.) The surviving brother may be advanced in years; the widow may be young; the probability may be that she will survive him. If her estate were to cease by reason of her unchastity, the benefit which he would derive from her fall would give him an interest in direct conflict with his moral duty of shielding her from temptation. But further the widow has a right to sell or mortgage her own interest in the estate, or, in case of necessity, to sell or mortgage the whole interest in it. (Dayabagha, chap. 11, s. 1, v. 62.) If her estate ceases by an act of unchastity, the purchaser or mortgagee might be deprived of his estate, if the surviving brother of the husband, should prove that the widow's estate had ceased

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in consequence of an act of unchastity committed by her prior to the sale or mortgage.

Again, if the surviving brother should die in the lifetime of the widow, all the nephews would succeed as heirs of their deceased uncle; but if the son of the surviving brother could prove that the widow's estate had ceased, by reason of an act of unchastity committed in the lifetime of his father, and that, consequently, the estate had descended to his father in his lifetime, he would be entitled to the whole estate as heir to his father, to the exclusion of the other nephews. Thus the period of descent to the reversionary heirs of the husband might be accelerated by an act of unchastity committed by the widow; the course of descent might be changed by her act, and persons become entitled to inherit as heirs of the husband, who, if the widow had remained chaste, would never have succeeded to the estate; and others who would otherwise have succeeded would be deprived of the right to inherit.

"In the case of *Katama Natchier vs. The Rajah of Shivagunga*, (9 Moore's Indian Appeals, 539), it was held that a decree in a suit, brought by a Hindu widow, binds the heirs who claim in succession to her; but that can only be in a suit brought by her, so long as she holds a widow's estate. It would cause infinite confusion if a decree in a suit, brought by a widow, could be avoided, if it could be shown that she had committed an act of unchastity before she commenced the suit. But if the rule contended for is correct, and the estate which a widow takes by inheritance is merely an estate so long as she continues chaste, all the acts which a Hindu widow could do in reference to the estate might be avoided by raking up some act of unchastity against her. Inconvenience would not be a ground for deciding a case like the present if the law were clear upon the subject; but it is an argument which may be fairly adduced when the authorities in favour of the opposite view are merely the expressions of opinion by Hindu law officers, or by European or modern text-writers, however eminent, or even decisions of a Court of Justice when they are in conflict with the decisions of other Courts of equal weight."

Upon the whole, then, their Lordships, after careful con-

tion of this question, and of the authorities bearing upon it, have come to the conclusion that the decision of the majority of Judges was the correct one, and it is important to remark that the High Court at Bombay, in the case of *Parvati vs. Bhiku*, 4 Bombay High Court Reports, p. 25, and the High Court in the North-Western Provinces in the case of *Bhaganti vs. Rudr Man Tware*, I. L. R., 2 All., 145, have given judgments to the same effect as that of the Full Bench at Calcutta in the present case. The widow has never been degraded or deprived of caste. If she had been, the case might have been different, subject to the question as to the construction of Act XXI of 1850; for upon degradation from caste before that Act a Hindu, whether male or female, was considered as dead by the Hindoo law, so much so that libations were directed to be offered to his *manes* as though he were naturally dead. See Strange's Hindu Law, 160 and 261, Menu, chap. XI, s. 183. His degradation caused an extinction of all his property whether acquired by inheritance, succession, or in any other manner—Dayabagha, chapter 1, paras 31, 32, and 33. The opinion of Mr. Colebrooke in the Trichinopoly case is founded on the distinction.

It is unnecessary to determine what would have been the effect of Act XXI of 1850, if she had been degraded or deprived of her caste in consequence of her unchastity.

Their Lordships, for the above reasons, will humbly advise Her Majesty to affirm the judgment of the High Court.

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 —  
 Judgment.

## [CIVIL APPELLATE JURISDICTION.]

1880  
April 7th.No. 85 of  
1877.

GUNGA NARAIN SEN (PLAINTIFF) . . . . APPELLANT ;  
AND  
HURISH CHUNDER CHANGDARS AND } RESPONDENTS.  
OTHERS (DEFENDANTS) . . . . }

*Apportionment of debts due on mortgages of different shares of same property—Priority—Decree, Form of.*

In certain lands A held an 8 annas share, and B and C each a 4 annas share.

A having mortgaged his share to G, the respondent took a mortgage of the whole estate, and afterwards the appellant took a mortgage of B's share and half of A's share.

Subsequently the respondent purchased the equity of redemption of the entire estate, the amount of the purchase-money being more than sufficient to pay off the first and second mortgages.

*Held*, that the appellant was entitled to have an apportionment of the amounts covered by the different mortgages made, and to have an 8 annas share in the land put up for sale, unless the respondent was willing to pay off his mortgage debt.

Rule of apportionment and form of decrees set out.

**A**PPEAL against the decree of the Judge of Beerbhoom, dated the 30th of December 1878.

Baboo *Mohiny Mohun Roy*, and Baboo *Troylucko Nath Mitter*, for Appellant.

Baboo *Sree Nath Dhur*, Baboo *Bhowany Churn Dutt*, and Baboo *Rajender Nath Dutt*, for Respondents.

The facts are set forth in the judgment of the High Court (1) which was delivered by

WHITE, J. WHITE, J. :—

The appellant, who is the plaintiff in the Court below, has sued Moti Lall and Bamon Lall Chowdhry, and the respondent Hurish Chunder, to recover the amount of a mortgage bond. The money was borrowed by the first two defendants, who mortgaged to the appellant an 8 annas share of Lot Behari. The appellant alleges as his reason for making the respondent a party to

(1) WHITE and MACLEAN, J.J. •



suit, that the first two defendants had sold the mortgaged property to the respondent; and the appellant seeks to recover the amount of the land from the mortgaged property, and also from the other properties, and from the persons of the first and second defendants. The amount claimed is Rs. 950 for principal, and Rs. 747 for interest, at the rate specified in the bond from the date of the bond up to suit, and for further interest at the same rate down to decree.

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The respondent, who is in possession of the mortgaged property, alone defended the suit.

The Court below decreed the plaintiff's claim in part, and directed that the plaintiff should recover Rs. 1,377-14, consisting of the principal sum of Rs. 950; of Rs. 65-14 of interest, at the bond rate from the date of the bond to the expiration of the term for repayment; of Rs. 27-4 for interest at 6 per cent. from the date of suit to that of decree, and of certain costs. The Court decreed that the appellant should recover Rs. 761-1 portion of the decreed amount, as well as Rs. 105-8-9 a proportionate part of the costs, from the mortgaged property, and also from the first and second defendants, and should recover the remainder of the decreed amount from the persons and properties of the last-mentioned defendants.

Although the decree orders that the plaintiff should recover a portion of the amount of the decree from the mortgaged property, yet in point of fact, having regard to the manner in which the Judge has dealt with the plaintiff's claim, that portion would not, in the execution of the decree, be recovered from the mortgaged property, but must be paid by the respondent to the appellant.

Against this decree the appellant has appealed, and the respondent has filed a cross-objection.

The facts of the case are somewhat complicated, but except in a few minor particulars are not disputed.

The genuineness and the validity of the appellant's mortgage is admitted. The property mortgaged by that bond is also admitted to be an 8 annas share of the zemindary called Lot Behari. The zemindary belonged to the two first defendants, and one Moti Lall in the following proportions. Moti Lall had an

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8 anna share, and Bamon Lall and Heera Lall had each 4 anna share. Bamon Lall, therefore, mortgaged to the appellant the whole of his share, and Moti Lall half of his share.

A portion of this property, together with other property, had been previously under mortgage to the appellant. But the mortgage was paid off in February 1875 with money borrowed by Moti Lall from the respondent, on which occasion Moti Lall mortgaged to the respondent his (Moti Lall's) 8 annas share of the zemindary. The respondent about the same time became mortgagee of the remaining 8 annas upon lending Bamon and Heera Lall a large sum of money.

Shortly afterwards the two first defendants again borrowed Rs. 950 from the appellant, and on the 17th Choit 1281 (A.D. 1875) executed to him the mortgage bond in suit.

On the 29th of Aughran (December 1877), defendant Moti Lall made an absolute sale to the respondent of his share of Lot Behari, and defendant Bamon and Heera Lall also similarly sold to the respondent their share of Lot Behari.

In respect of Moti Lall's sale the surplus of the purchase money over and above the money due to the respondent upon his mortgage was Rs. 1,043. In respect of Bamon and Heera's sale the surplus, after making a similar deduction, was Rs. 536-2-11. The total surplus, therefore, arising from the sale of the entire 16 annas of the zemindary was Rs. 1,579-2-15.

The respondent does not appear to dispute the right of the appellant to a lien upon 8 annas of the zemindary by virtue of his mortgage bond, but he alleges in his written statement that he had paid away the whole of the surplus in satisfaction of mortgages and liens upon the zemindary which were all prior date to the plaintiff's mortgage.

The lower Court has held that the respondent failed to prove that he had so applied the money, except as regards one Ganga Chunder, and that to him he had paid Rs. 500 only.

The respondent's application of the surplus is the only point disputed in the case, and forms the subject of respondent's objections.

It is admitted on both sides that the respondent had a first mortgage over the whole of the zemindary.

Moti Lall's share had some time before the date of the respondent's, and therefore, of course before the date of appellant's, been mortgaged by Moti Lall to one Grish Chunder.

The money that remained due to Grish Chunder at the time when the respondent purchased the whole zemindary was Rs. 761-8.

Having examined the evidence, I am of opinion that the respondent has satisfactorily shown that he paid to Grish the whole of that balance and not merely Rs. 500. Grish Chunder Mookerjee and Obhoy Kumar Roy have been called as witnesses. The petition also has been produced signed by Grish, admitting that he had received the balance due to him from the respondent through Okhoy. Okhoy deposes to the truth of this. It does not matter whether the balance was paid out of the surplus purchase money or from the funds of the respondent. In either case he is entitled to add to his own mortgage money, the balance which he paid to Grish Chunder.

As regards the rest of the cross objection of the respondent which is, that he had disposed of the remainder of the surplus purchase money in paying off liens prior in date to the appellant's mortgage, I agree with the Judge that he has failed to make out that such was the case.

What then was the position of the incumbrances upon Lot Behari at the time of the respondent's purchase? Grish was the first mortgagee of 8 annas, formerly belonging to Moti Lall; and a balance of Rs. 761-8 was due to Grish in respect of his mortgage. Respondent was second mortgagee of the same 8 annas share, and first mortgagee of Bamon and Heera's respective shares, which constituted the remainder of the zemindary. Appellant was third mortgagee of half Motilal's share, and second mortgagee of Bamon's 4 annas share. By the purchase the respondent became the owner of the equity of redemption in the whole 16 annas of the zemindary.

Such being the legal position of the parties, the lower court has held the main question to be, whether the money given to the respondent for the entire 16 annas represented the fair value of the zemindary, and, considering that it did, it holds that the appellant's rights as against the respondent are con-

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*Judgment.*

WHITE, J.

fined to receiving from him so much of the surplus proceeds of sale as the respondent cannot show to have been expended in satisfying mortgages and liens prior in date to the appellant's mortgage bond.

In thus dealing with the appellant's claim, I think the lower Court was wrong; what respondent bought from Moti, Bamou and Heera in 1877 was only the equity of redemption in the zemindary, that is to say, the right to enjoy the property as his own, after having redeemed the incumbrances in the order in which they were created.

The appellant is entitled either to redeem, or to have the property mortgaged to him put up for sale, in order to ascertain whether the net proceeds of sale, after paying off what is due to the respondent, who is now the sole prior incumbrancer on the property, are sufficient to satisfy the whole or any portion of his, the appellant's, mortgage debt.

If this suit were being tried before an English Court, the appellant might bring a suit for the purpose of redeeming the respondent, and in that suit a decision would be made declaring that he is entitled to redeem the respondent, and that on his redeeming the respondent the latter would be entitled to redeem the appellant.

The effect of such a decree would be, that the appellant would have to pay off what was due to the respondent, and on so doing his mortgage would become the sole incumbrance on the property, and then the appellant would have to pay that off or lose the equity of redemption which he had bought in the mortgaged property.

In this country rights under mortgages, except, perhaps, on the original side of the High Court, are seldom worked out through the medium of redemption. The more usual as indeed the more simple practice is, when the mortgagor does not appear to pay them off, to direct the mortgaged property to be sold, and the net proceeds of sale to be divided between the incumbrancers according to the priority of their incumbrances.

In the present case the appellant asks that an 8 annas share of the property may be put up for sale by the Court, and he alleges that that share is of sufficient value to pay off in full his

own debt, as well as all that is due to the respondent in respect of that share, if a proper apportionment of the amount due under the three mortgages is made.

I think that the appellant is entitled both to have an apportionment made, and to have an 8 annas share of the zemindary put up for sale, unless the respondent is willing to pay off the appellant's mortgage debt.

The respondent has purchased the equity of redemption in the whole 16 annas, and each anna of it, and therefore each 4 annas of the equity of redemption must bear its fair proportion of the encumbrances; out of the 8 annas, formerly belonging to Moti Lall, and charged by him in favor, first, of Grish Chunder, and secondly of the respondent, 4 annas must bear half of the amount due to those persons in respect of their mortgages, and remaining 4 annas over which the appellant has a third mortgage must bear the remaining half of the amounts so due to Grish Chunder and the respondent. Similarly the 4 annas formerly belonging to Heera, and of which the respondent is the first and only mortgagee, must bear half the amount due to the respondent in respect of the mortgage created by Heera and Bama of their respective shares, and Bama's 4 annas must bear the remaining half of the latter amount.

It is not disputed that the amount due to the respondent at the time of his purchase, in respect of the mortgage by Moti Lall of his 8 annas share, was Rs. 16,731, and in respect of the mortgage by Heera and Bama of their remaining 8 annas share was Rs. 17,238; and this Court has found that the balance paid by the respondent to Grish Chunder, in respect of his first charge upon Moti Lall's share, was Rs. 761. Applying, therefore, the rule of apportionment just laid down, the half of Moti Lall's share over which the respondent holds his third mortgage, must bear Rs. 8,365-8 and Rs. 380-8, and Bama's share, over which the respondent holds a second mortgage, must bear Rs. 8,619. The total amount, therefore, with which the 8 annas, mortgaged to the appellant, must be considered to be charged with in priority to its own mortgage, is Rs. 17,365.

It now remains to fix the amount due to appellant, as third mortgagee. The District Judge, as I have stated, has only allowed

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interest to the appellant at the bond rate from the date of the bond to the expiration of the term for repayment, and from thence to the date of decree he has awarded interest at 6 per cent. per annum. The bond is dated 17th Choitro 1281. The stipulation as to interest is as follows:—"We shall pay interest at the rate of 2 per cent. per mensem. The month of Assar 1282 is fixed as the term of repayment of the money, and by that time we shall pay off in cash the whole amount, together with interest thereon. If we fail to pay the money in Assar, we shall from the succeeding Srabun pay it at 3 per cent. per mensem until the date of realization."

In his plaint the appellant, whilst adverting to the stipulation that on default in Assar 1282, the contract was to pay 3 per cent. per mensem, claims interest only at the rate of 2 per cent per mensem; in other words he waives his right to exact interest at the higher rate.

The Judge holds that the stipulation to pay interest at the higher rate is "nothing more or less than a penalty clause, therefore not enforceable in Court." He adds, "setting this penalty clause aside, we have no specific contract for the payment of interest after the stipulated time for payment. I would, therefore, award interest after date specified for payment at the rate of 6 per cent. per annum. I am of opinion that the Judge is in error in so construing the stipulation. It does not fix a higher rate of interest in substitution of a lower rate, provided a default is made in the payment of interest at the lower rate. It simply provides that upon default, in prompt payment at the time fixed for the repayment of the principal and interest at 2 per cent. per mensem a new and higher rate of interest shall become payable. The appellant, therefore, is not precluded from claiming 2 per cent. per mensem from the date of the bond until the date of the decree.

I may also add that even if the higher rate of interest has been in the nature of a penalty, the Judge is further in error supposing that it cannot, under any circumstances, be enforced but that the Court must throw it out of consideration altogether. The Contract Act, IX of 1872, section 74, prescribes a rule which the Court is to deal with a penalty.

Inasmuch as the shares of Moti Bamon and Heera Lall in the zemindary were undivided shares, the order for sale may be simply for 8 annas, or a moiety of the zemindary, and in making the order I think we may introduce into it a direction similar to that which was given by MARKBY and ROMESH CHUNDER MITTER, *J. J.*, as reported in 25 W. R., 516, namely that at the auction the moiety should be put up at the upset price of Rs. 17,365, which is the amount chargeable upon the moiety in favor of the respondent, and I think the respondent and the appellant should each have liberty to bid at the auction.

The respondent contends that if the appellant is entitled to have a fresh sale, he, the respondent, ought to have further interest upon half the amount of his mortgage money from the date of his purchase up to the date of the fresh sale, he consenting, on the other hand, to give credit for mesne profits during that interval, and that an account ought to be directed for the purpose. But I think this is unnecessary; the appellant purchased each moiety of the zemindary for something beyond the amount of his own mortgages, in fact for a sum sufficient to pay off himself and Grish's balance, and leave a small surplus. He has been in possession of the zemindary since his purchase, and it may be presumed under these circumstances that the mesne profits are a fair equivalent for the further interest which he seeks.

The appeal will be allowed, and the decree of the lower Court set aside, and in lieu thereof the following decree is made :—

We declare that the plaintiff is entitled to recover, under his mortgage bond, Rs. 950, together with interest upon that sum at the rate of 2 per cent per mensem from the date of the bond to the date of this decree. We order that unless the third defendant (respondent) do, before the sale hereinafter mentioned shall actually take place, pay to the plaintiff (appellant) the amount hereby declared to be due upon his mortgage bond, an 8 annas share of the zemindary Lot Behari be put up for sale at the upset price of Rs 17,365, with liberty for the plaintiff and third defendant respectively to bid at the sale if no one bids; and we further order that if at such sale more than is sufficient to cover the upset price and the expenses of sale, then that the third

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*Judgment.*

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defendant be declared the purchaser of the 8 annas share, and entitled to hold the same discharged from the appellant's mortgage security, and without paying the sum bid by him or any money except the expenses of the sale, and in such case we order that the plaintiff do recover from the first and second defendants the whole of what is due to him under this decree; and we further order that if the 8 annas share is sold for more than sufficient to cover the upset price and the expenses of sales, then that out of the proceeds of sale there be paid to the third defendant Rs. 17,365, or if he is the purchaser, that he be allowed to retain the last mentioned money out of the purchase money, and that the balance of the purchase money, after deducting the Rs. 1,763 and the costs of sale, be applied to the payment of the amount due to the plaintiff under his mortgage; and that if any surplus remains after making such last mentioned payment, then that the same be paid to the respondent, but if the balance of the purchase money, after deducting the Rs. 17,365 and the costs of sale, fall short of what is due to the appellant upon his mortgaged bond, then that the whole of such balance be paid to the plaintiff, and in such case we order that the plaintiff do recover from the first and second defendants what, after such last mentioned payment, remains due to the plaintiff under his mortgage bond; and we further order that as between the plaintiff and the first and second defendant, the two latter shall pay to the plaintiff so much of his costs in the Court below as consist of the institution fee and vakeel's fee, and the costs of proving the bond, and that the plaintiff shall bear the remainder of his own costs in the Court below, and that as between the plaintiff and the third defendant, they shall, each of them, bear his own costs of the lower Court and of this appeal; and we further order that as between the plaintiff and the first and second defendant, the plaintiff do recover from the two latter interest at the rate of 6 per cent. per annum on the amount of this decree from its date until realization.

MACLEAN, J. MACLEAN, J. :—

I concur in the proposed decree.



## [ORIGINAL CIVIL JURISDICTION.]

GOBIND CHUND GOSSAMI AND OTHERS . . PLAINTIFFS ;

AND

RUNGUN MONEY DOSSEE AND OTHERS . . DEFENDANTS.

*Limitation Act, XV of 1877, Schedule II, Article 178—Review of Suit, Application for.*1880  
March 18th.

The Limitation Act does not apply to applications to the Court with reference to its own list of causes, such as applications to transfer a case from one board to another, or to transfer a case to the bottom of the board.

SEMBLE : Where the Court allows a suit to be re-constituted, a new right to have the case replaced upon the board accrues, and limitation runs from that time.

**T**HIS was an application to revive a certain suit, and to have it restored to the Board of Causes.

It appeared that one Cassinath Mullick died, leaving a will, of which he appointed his wife Rungun Money Dossee executrix, and by which he appointed one Gocool Chunder Gossami trustee, for the purpose of carrying out certain, religious trusts. On the 4th of June 1869 Gocool Chunder Gossami instituted a suit against Rungun Money Dossee, praying that the trusts of the will might be established and carried into execution. By a decree in that suit, made on the 6th of December 1869, the will was established, and it was declared that the trusts ought to be performed, and certain enquiries were directed to be made for the purpose of having a scheme settled by which the trusts were to be carried out. Before this scheme was finally settled and approved, and while the proceedings were pending, the case was on the 14th of August 1875 struck out of the board for want of prosecution. On the 12th of March the Administrator-General of Bengal obtained a transfer of the estate of Cassinath Mullick from Rungun Money Dossee under section 31 of Act II of 1874. Gobind Chunder Gossami died on the 9th of April 1879, and Rungun Money Dossee died on the 14th of the same month, leaving a will of which she appointed the Administrator-General executor, and of which will

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*Argument.*

he obtained probate on the 14th of June 1869. The sons of Gobind Chunder Gossami claiming, according to Hindu law and usage to be entitled to the benefit of the religious trusts in the will mentioned, and to perform the acts and services therein prescribed in the place of their father, instituted a suit against the Administrator-General for the purpose of having the trusts of the will, and the decrees in the original suit, carried out. This suit was dismissed by Mr. Justice BROUGHTON under section 13 of the Civil Procedure Code (Act X of 1877.)

The plaintiffs appealed, and on appeal it was held (see for report of proceedings, 5 C. L. R., 569—*Gocool Chunder Gossami vs. Administrator-General*)—that the effect of striking out the original suit was not to put an end to it, but that it was subsisting, and could be reconstituted, and it was directed that the plaintiffs should be allowed to amend their plaint by putting it into the form of a petition under section 372 of the Civil Procedure Code.

The plaintiffs now presented a petition, praying for an order that the original suit might be revived and restored to the Board of Causes; that their names might be inserted in the record as parties plaintiffs in the place of Gocool Chunder Gossami, and that the name of the Administrator-General of Bengal, as representative of the estates of Cassinath Mullick and Rungun Money Dossee, might be substituted as party defendant in the place of Rungun Money Dossee.

*Phillips*, for the Plaintiffs.

*Bonnerjee*, for the Administrator-General.

*Bonnerjee* :—The principal point is whether the plaintiffs are now entitled to have the case, which was struck out of the board, restored to it. I submit that the application is barred by limitation under section 178 of schedule II of Act XV of 1877 which provides a period of three years limitation, from the time when the right to apply accrues, for an application for which no period of limitation is provided elsewhere in the schedule, or by the Code of Civil Procedure (section 230.) Section 4 of the Limitation Act provides that, “every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by

ond schedule hereto annexed, shall be dismissed although ion is not set up as a defence." Section 5 provides that appeal, or application for a review of judgment may be ed after the period of limitation, prescribed therefor, he appellant or applicant satisfies the Court that he had at cause for not presenting the appeal, or making the tion within such period." The reference was struck out tle 537—Belchambers' Rules and Orders—and the present tion, which is made under Rule 538, is an application within ining of section 4 of the Limitation Act. It is not an tion for a review, but an application not otherwise provided he right to apply accrued on the day after that on which e was struck out, namely the 15th of August 1875.

plaintiff was bound to go on with due expedition. It was b his default that the suit was struck out, and he should plied immediately to have the case restored, and therefore it accrued immediately after the case was struck out, just as it on a bond or promissory note the time begins to run ately after the money is payable. The question is, whether sent applicants are entitled to say that their right accrued leath of their father and not on the day when he should oved. If they took by descent and not as purchasers, er barred the father barred them.

ips.—Article 178 has no application to this case. The an, of its own motion, restore the case to the Board. l no right till 1879, when Gobind Chunder Gossami died. s is anything at all in the point of limitation, it should en brought before the Appellate Court. That Court did ide that one suit would not lie, but held that another f procedure was right. It is admitted that the suit e revived; when revived the right to apply to restore it

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*Cur. ad. vult.*

judgment of the Court, which was delivered on the 18th was as follows :—

J :—

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case a decree had been made and a reference ordered.

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In 1875 the case was struck out of the reference list under Rule 537 in Mr. Belchamber's book, and the application now made is to restore it. The application is to reconstitute the suit by placing the sons of the deceased plaintiff on the record as plaintiffs, and restore it to the board. The Court of Appeal in this case has decided the effect of this Rule, and held that the case being struck out does not put an end to the suit, but that it is an existing suit, so that it can be reconstituted. It was contended, however, that the Court had no power to grant the second part of the application, namely to restore the case, and the objection is taken on the ground of limitation under article 178 of the third division of the schedule to the Act.

Under that article the period of limitation is three years. The words of the article are general:—"Applications for which no period of limitation is provided elsewhere in this schedule or by the Code of Civil Procedure, section 230." But, as in all cases where general words are used, the general words must be construed with reference to the words they follow. I do not propose to attempt to say what class of applications fall under this article. But they must certainly be application *ejusdem generis* with those specified; and I do not think the article applies to this case.

I do not think the Legislature intended to include every application to the Court in reference to its own lists, and all the matters of detail incident to the conduct of judicial business, such as applications to transfer a case from one board to another, to transfer a case to the bottom of the board, to change an attorney, and so forth. Even if the case fell within the article, I am not sure I should feel constrained to say that this application should be refused. Perhaps when the Court allows a suit to be reconstituted a new right to have the case replaced on the board accrues, and the limitation runs from that time.

The application is granted in the terms of the petition, that is to say, the suit will be reconstituted as asked for, and will take its place in the reference list.

## [CRIMINAL APPELLATE JURISDICTION.]

EMPRESS . . . . . APPELLANT;

AND

MAHUDDI AND ANOTHER . . . . . RESPONDENTS.

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1880

*Criminal Procedure Code (Act X of 1872), section 457—Penal Code, (Act XLV of 1860), sections 149 and 325—Charge, Alternate or separate—Jury, Verdict of—Sentence on appeal from acquittal, Commencement of—Acquittal, Reversal of sentence of.*

Under section 457 of the Code of Criminal Procedure (Act X of 1872), it is competent to a Jury to return a verdict of guilty of an offence under section 325 only of the Penal Code, although that offence did not form the subject of a separate charge, but was entered as a charge coupled with an offence under section 149 of the Penal Code.

Where the Jury is unanimous, their verdict must be received unless it be contrary to law; the Court is not competent in such a case to direct it to reconsider its verdict.

Where on the appeal of Government an order of acquittal is set aside and sentence passed, that sentence will commence to run from the date of the committal of the accused to jail, and not from the date of their arrest or of the sentence on the appeal.

**T**HIS was an appeal by the Government from an acquittal in trial before the Sessions Judge of Dacca sitting with a Jury.

The circumstances appear from the decision of the High Court.

The *Deputy Legal Remembrancer* appeared for the Government. *Baboo Nund Dulall Pyne*, for the Accused.

The judgment of the High Court (1) was delivered by

PRINSEP, J.:—

PRINSEP, J.

Mahuddi and Panchoo, together with others, were charged, under section 149 of the Indian Penal Code, read alternately with sections 302, 304 and 325 of the Penal Code, that is with being members of an unlawful assembly at a time when (1)

(1) MORRIS and PRINSEP, J.J.

1880  
 EMPRESS  
 v.  
 MAHUDDI.  
 Judgment.  
 PRINSEP, J.

murder, or (2) culpable homicide not amounting to murder, or (3) grievous hurt was caused by some member of that assembly in prosecution of its common object.

The Jury absolutely acquitted all, except Mahuddi and Panchoo, but with regard to these two men the Jury unanimously found that they were guilty only under section 325, Penal Code, *i.e.*, of having voluntarily caused grievous hurt without grave or sudden provocation. What then followed is thus recorded by the Sessions Judge:—"The Court informed the Jury that there was no charge under this section, and requested the Jury to reconsider their verdict. The Jury accordingly retired for that purpose. They returned to Court at 12 minutes to 4 o'clock P.M. The foreman stated they were not unanimous in their verdict against the prisoners. The Court requested them to retire again and consider their verdict. The Jury returned at 5 minutes to 4, and the foreman stated that the Jury, by a majority (the numbers being 3 to 2), found all the accused not guilty of all the charges."

With regard to the verdict against Mahuddi and Panchoo the Sessions Judge has further recorded his own opinion that he could not accept that verdict, because "(1) there was no charge against them under this section (325); and (2) in his opinion there was no evidence under section 325 against them."

An appeal has been made by Government against the acquittal of Mahuddi and Panchoo on the ground that the Sessions Judge was bound to accept the unanimous verdict of the Jury, finding these prisoners guilty under section 325 of the Penal Code; that he was not competent to direct them to reconsider their verdict; that that verdict was a good verdict although the offence punishable under section 325, Penal Code, did not form the subject of a separate charge; and that there was evidence on which the Jury might have convicted the prisoners under section 325 of the Indian Penal Code.

After hearing the Deputy Legal Remembrancer for Government, and the pleader of the prisoners, as well as Mr. C. H. Reilly, as *amicus Curiae*, we are of opinion that on all these grounds that the Sessions Judge has committed an error of law, and unanimous verdict of the Jury, convicting Mahuddi and Panchoo

under section 325 of the Penal Code, should have been received.

In our opinion, under the terms of section 457 of the Code of Criminal Procedure, it was competent to the Jury to return the verdict of guilty only under section 325 of the Penal Code, although that offence did not form the subject of a separate charge, but was entered in a charge, coupled with section 149 of the Penal Code. Section 457 of the Code of Criminal Procedure enables a verdict to be given on some of the facts which are a component part of the original charge, provided that those facts constitute a minor offence. Thus, in the present case, the prisoners were not charged themselves with having caused the grievous hurt, but were charged with being members of an unlawful assembly, some of the members of which, in prosecution of its common object, caused that grievous hurt. The verdict of the Jury was, as we understand it, that there was no assembly, but that the grievous hurt was nevertheless caused by these two prisoners. Section 263 requires that "the Jury shall return a verdict on all the charges on which the accused is tried." The requirements of the law are satisfied if in returning their verdict a Jury, acting under section 457, returns a verdict of conviction of a minor offence forming part of one of the charges. The verdict which the Sessions Judge refused to take was, in our opinion, a good and legal verdict.

Section 263 declares under what circumstances a Sessions Judge may "require a Jury to retire for further consideration," that is to say, when "the Jury are not unanimous." If the Jury are unanimous, the verdict must be received, unless it is contrary to law. If the Sessions Judge disagrees with an unanimous verdict, which is not contrary to law, he should proceed as laid down in clause IV, section 263. In the case now before us there is nothing in the verdict convicting the prisoners under section 325, Penal Code, which is contrary to law. But as Mr. Reily very properly brings to our notice, the Sessions Judge might have said to the Jury that, if they were of opinion that these prisoners could be convicted only under section 325 of the Penal Code, they must return a verdict of acquittal, because there was no legal evidence to sustain such a verdict.

1880  
 EMPRESS  
 v.  
 MAHUDDI.  
 Judgment.  
 PRINSEP, J.

1880  
EMPRESS  
v.  
MAHUDDI.  
Judgment.  
PRINSEP, J.

That was not the manner in which the Sessions Judge treated this case, as is shown from the extract from the record which has been quoted; but even under such circumstances the Sessions Judge would have acted contrary to law, and afforded just grounds for this appeal, because there is legal evidence which, if believed, would have been sufficient to sustain the verdict. We refer more particularly to the statements which are declared by witnesses to have been made by the wounded man that his injuries were caused by these two prisoners. These injuries have caused his death, and, therefore, his statements were legal evidence under section 32 of the Evidence Act, on which the Jury might form their verdict.

For these reasons we direct that the verdict of the Jury acquitting Mahuddi and Panchoo, be set aside; that in its place the unanimous verdict of the Jury, convicting Mahuddi and Panchoo under section 325 of the Penal Code, be entered on the record; and we do accordingly sentence Mahuddi and Panchoo to seven years in transportation.

The Sessions Judge will issue the usual warrants.

*NOTE.*—The Sessions Judge subsequently enquired whether these sentences were to have effect from the date of the order of High Court, or of the arrest of the accused, or of their committal to jail, and received the following reply:—

The sentences commence from the date of the warrants committing the prisoners to jail. The Sessions Judge should not issue these warrants until he has possession of the prisoners after their arrest. The order of the High Court was one of imprisonment in transportation for a certain term, which will not commence until the prisoners have been committed to jail.—ED.



## [CRIMINAL JURISDICTION.]

NISAI MESTRI AND ANOTHER . . . . . APPELLANTS ;

AND

EMPRESS . . . . . RESPONDENT.

1880  
May 13th.Nos. 718 and  
719 of 1879.

RAM SOONDUR REMDAL AND ANOTHER . APPELLANTS ;

AND

EMPRESS . . . . . RESPONDENT.

*Confession—Criminal Procedure Code (Act X of 1872), sections 122 and 346—Certificate required by section 34 of Criminal Procedure Code—Evidence as to confession under section 346 of Criminal Procedure Code.*

A certificate which contained the words "taken by me," but in which the Magistrate omitted to record that the prisoners' statement was taken in his hearing, was treated to be substantially a compliance with section 346.

*Per Curiam.*—Evidence taken under the last clause of section 346 ought to be by the Committing Magistrate.

Where a confession is taken under section 122 of the Code of Criminal Procedure, the omission to record the certificate, required by section 346, cannot be remedied by taking evidence under the last clause of the latter section.

## CRIMINAL APPEALS.

In these two appeals the question as to the admissibility of certain confessions had to be determined. The circumstances under which they were brought so far as is necessary, this should be stated for the purposes of this report, appear from the judgment of the Court. The cases were originally heard on the 24th March, but were adjourned in order that the decision of the Full Bench on the question of the admissibility of certain confessions which was then under consideration in the case of *Empress vs. Anauthram Singh*, reported *ante*, p. 297 might be known.

The facts appear from the final judgments of the High Court (1) which were as follows :—

No. 718. We have now considered the cases of the prisoners

(1) WHITE and MACLEAN, *J.J.*

1880  
NISAI  
MESTRI  
v.  
EXPRESS.  
Judgment.

Nisai Mestri and Ram Chandra Haldar, with reference to the ruling of the Full Bench in the case of Anauthram Singh and others referred to in our judgment of 24th March, and are of opinion that the ruling in question has no application in the present case, but that the confessions are inadmissible for the following reasons: They were in our opinion confessions recorded under section 122 of the Code, and are defective from the omission of the Deputy Magistrate to record the certificate required by section 346, Criminal Procedure Code, and the defect cannot be cured by taking evidence under the last clause of section 346.

Independently of this objection, we think that, even if the defect could have been cured by taking evidence under that section, the Sessions Judge had no evidence on the point before him on which he could act; for the last clause of section 346 directs that the Court of Sessions shall take the evidence. In this case the Committing Magistrate took the deposition of the recording Magistrate, which he appears to have had no authority to do. Furthermore, we think that if the Committing Magistrate had power to take the recording Magistrate's evidence, the Sessions Judge has not shewn that that Magistrate's deposition was properly admitted under the provisions of the 33rd section of the Evidence Act of 1872. There is nothing on the record to shew that the presence of the recording Magistrate could not have been obtained without an amount of delay or expense which, in the opinion of the Court, was unreasonable.

We accordingly set aside the conviction and sentence, and direct the discharge of the appellants Nisai Mestri and Ram Chundra Haldar.

No. 719.—Having considered the ruling of the Full Bench in the recent case decreed by them, of *Anauthram Singh* and others, we are of opinion that it has no application in the present case.

As regard the prisoner Ram Soondur Mondul, we consider that his confession is inadmissible for reasons which we have recorded in our judgment of this date in the case of Nisai Mestri and Ram Chundra Haldar (No. 718), and accordingly set aside the conviction of Ram Soondur Mondul, and direct that he be discharged from prison.

With respect to Nisai Haldar, we consider that his confession is admissible, as in recording it the provisions of section 123 and section 346 have been duly observed by the recording Magistrate, with the exception that the certificate contains an omission of the words that the prisoner's statement was made "in his hearing." Having regard, however, to the fact that the certificate has the words "taken by me," we think that the certificate may be treated as substantially complying with the requirements of section 346. We, therefore, affirm the conviction and sentence of Nisai Haldar.

1880

## [CIVIL APPELLATE JURISDICTION.]

JHURI MAHTON . . . . . APPELLANT;

AND

THAKOOR NATH SAHEE . . . . . RESPONDENT.

April 19th.

No. 577 of  
1880

*Limitation Act, XV of 1877, Schedule II, Arts. 62 and 115—Money had and received.*

Where money was deposited pending negotiations for a new lease, there being an agreement that if no lease were granted the money should be returnable, *Held*, in a suit to recover the money deposited, on the negotiations having fallen through, that the money became money had and received by the defendant for the plaintiff's use, from the time that the negotiations fell through, and that, not Art. 115, but Art. 62 of Act XV of 1877 applied.

APPEAL from a decision passed by the Officiating Judicial Commissioner of Chota Nagpore, affirming the decree of the Officiating Deputy Commissioner of Hazareebagh.

Mr. M. L. Sandel, for the Appellant.

No one appeared for the Respondent.

The facts appear from the following judgment of the Court (1) which was delivered by

WHITE, J. :—

WHITE, J.

We have heard Mr. Sandel for the appellant, who is the plain-  
in the First Court.

(1) WHITE and MACLEAN, J.J.

1880  
 JHURI  
 MAHTOON  
 v.  
 THAKOOR  
 NATH SAHAR.

*Judgment.*

WHITE, J.

The appeal is confined to a sum of Rs. 895. The lower Appellate Court has held that the claim of the plaintiff is barred by the Law of Limitation, inasmuch as the suit is not brought within three years from the date when the money became payable.

The money in question was deposited by the plaintiff with the defendant pending negotiations for a new lease; and the arrangement was, that if the new lease was granted, these 895 rupees should be treated as part of the security to be given for the due performance of the lease; but that if no new lease were granted the money should be returned. The negotiations fell through, and the consequence was, that the money immediately became repayable, and in the eye of the law was money had and received by the defendant for the use of the plaintiff. Article 62 of the Schedule of the Indian Limitation Act prescribes three years' limitation for a suit to recover money, payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use; and the date from which the three years are to count is when the money is received, that is, received by the defendant for the use of the plaintiff.

Under the circumstances which I have stated, the money in this case did not become money received by the defendant for the use of the plaintiff, until the failure of the negotiations for a new lease.

The article of the Limitation Act, which the lower Court has applied, is Article 115 of the 2nd Schedule. This article relates to suits for compensation for breach of contract.

Inasmuch as in the present case, it was expressly stipulated that the money should be returned if the new lease were not granted, it may no doubt be said that the defendant broke his contract when he failed to return the money. But in my opinion the more appropriate article is article 62, for what the plaintiff really seeks is not compensation, which means damages, but to get back the money which he had deposited. As the period of limitation fixed by both the articles is the same, the question as to which article is most applicable becomes of no practical importance. We think the Judge was clearly right in holding the suit to be barred. It is, therefore, unnecessary to direct a

notice to be sent to the lower Court, or a notice to be served on the respondent or his pleader.

1880

We confirm the decision of the lower Appellate Court, and direct that the confirmation be notified to that Court under section 551 of the Code of Civil Procedure.

[CIVIL APPELLATE JURISDICTION.]

MUDUN MOHUN SINGH (PLAINTIFF) . . APPELLANT;  
AND  
RAM DASS CHUCKERBUTTY AND OTHERS }  
(DEFENDANTS) . . . . . } RESPONDENTS.

March 19th.

No. 198 of  
1878.

*Mesne profits, Liability of actual occupier and of his lessor for—Joint trespass—Interest on Mesne profits, Calculation of.*

Where lands are wrongfully withheld from the rightful owner, not only the actual occupiers but also the person who has leased the land to the actual occupiers, may be held to have committed a joint trespass and to be jointly liable for the damages caused by such trespass—*Deo vs. Harlow*, 12 Ad. and Ell., 40, followed.

Interest on mesne profits may be allowed from the commencement of the suit at the annual rate allowed by the Court—*Hurroopersaud Roy vs. Shamapersaud Roy*, I. L. R., 3 Cal. (P. C.) 654, followed.

**R**EGULAR APPEAL from a decision passed by the Deputy Commissioner of Manbhoom.

The plaintiff in this case sued to recover mesne profits of certain *mani* lands for the years 1273 to 1277 inclusive.

There were four sets of defendants. The defendant No. 1 represented one Kanya, deceased, who was found to have held 35 beegahs 14 cottahs and 7½ gundas of the lands claimed. The defendants Nos. 2 and 3 had admittedly occupied 3 beegahs out of these 35 beegahs under Kanya, but no other lands.

The fourth defendant it was found had held no portion of the lands in respect of which the mesne profits were claimed.

The Deputy Commissioner was of opinion that the defendant No. 1 only was liable for mesne profits, but inasmuch as he considered that the other defendants had, by combining with defendant No. 1, kept the plaintiff out of possession, he ordered that they should bear a proportion of the costs.

1880  
 MUDUN  
 MOHUN  
 SINGH  
 &  
 RAM DASS  
 CHUCKER-  
 BUTTY.  
 Judgment.

From that decision all the defendants, except the fourth defendant appealed the High Court.

Baboo *Bhowany Ghurn Dutt*, and Baboo *Oma Kally Mookerjee* for Appellant.

Baboo *Nil Madhub Sen*, and Baboo *Gopaul Chunder Sircar* for Respondents.

The judgment of the High Court (1) was delivered by

WHITE, J. WHITE, J. :—

This is a suit brought by the appellant, who was the plaintiff in the Court of the Deputy Commissioner of Manbhoom, against four defendants, the heirs of one Kanya Dass, called collectively defendants No. 1, and three other defendants, for the mesne profits of certain *mani* lands, of which, by a decree of the Moonsiff of Manbhoom, dated in 1870, the plaintiff had been declared entitled to get khas possession.

The defendants in the suit before the Moonsiff were twelve in number, of whom Kanya Dass and the three other defendants in the present suit formed four.

The Deputy Commissioner has decided that defendant No. 1 was liable for mesne profits in respect of 35 beegahs of the *mani* land occupied by Kanya Dass, and has passed a decree against defendant No. 1 for Rs. 559, 1 anna 9 pie, and has directed him to pay costs, calculated on a larger amount than the appellant has recovered. With regard to the defendants Nos. 2 and 3, the Deputy Commissioner considered that they were not liable to pay mesne profits in respect of any *mani* land, and dismissed the suit as against them; but in consequence of their conduct in combining with first defendant to keep the plaintiff out of his land, the Court made these defendant pay a portion of the costs of the suit. As regards the defendant No. 4 he held that she too was not liable for mesne profits, but made her for the same reason pay a portion of the costs. She has not appealed, and therefore as against her there will be no alteration in the decree of the lower Court. But defendants Nos. 1, 2 and 3 have filed cross objection to the Court below.

(1) WHITE and MACLEAN, J.J.

appellant in the first place has urged that the three respondents ought to be held jointly liable to pay mesne profits in respect of 83 odd beegahs of land which he alleges to be the moiety of land found to be *mani* by an Ameen who had been employed by the Deputy Commissioner to make a local investi-

1880  
MUDUN  
MOHUN  
SINGH  
v.  
KANYA DASS  
CHUCKER-  
BUTTY.

The respondents are of opinion that the respondents cannot be made jointly liable for the occupation of the whole of the lands. The basis of the suit for mesne profits is the decree of the Moonsiff, and it is from that decree that Kanya Dass was considered and held by the Moonsiff to be in possession of half only of the lands. The *mani* lands in that decree are stated to be 71 odd beegahs, and the Ameen, who acted in the present suit, has stated that the quantity of *mani* lands, which had been in the possession of the respondents, and upon which the mesne profits should be paid, is 35 beegahs 14 cottahs 7½ gundas, which practically is half the *mani* lands. The Ameen in this suit has also stated that the mesne profits of this portion of the *mani* lands for the five years in respect of which the suit is brought amount to 489 rupees 3 annas 10 gundas, and that the profits for one year is 97 rupees 13 annas 10 gundas. We think, therefore, that as regards Kanya Dass he must be taken to have been in possession of that quantity of land only, and to be liable for the mesne profits in respect of that portion only.

Judgment.  
WHITE, J.

As regards the other two respondents, defendants Nos. 2 and 3, they were not found by the Moonsiff's decree to have occupied any portion of the remaining moiety of the *mani* lands, but by their own admission they have occupied under Kanya 8 out of the 35 beegahs. The appellant contends that they ought, together with respondent No. 1, to be made liable in respect of the three beegahs.

As much as they actually occupied those lands, I think that they are primarily liable for the mesne profits in respect of the three beegahs. I further think Kanya, their lessor, although not in occupation, ought to be held to have become jointly liable with them in respect of those mesne profits.

The Court below has found, and no reason has been shown why that finding should be disturbed, that Kanya and

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MUDUN  
MOHUN  
SINGH

v.  
RAMP DASS  
CHUCKER-  
BUTTY.

*Judgment.*

WHITE, J.

respondents Nos. 2 and 3, who are all Chuckerbuttys, living in the same village, and doubtless connected with one another, joined in keeping the plaintiff out of possession of the moiety in question, and upon the authority of the case of *Doe vs. Harlow* in 12 Ad. and Ell., 40, it appears that where such is the case not only the actual occupier, but also the party who leases the land to the actual occupier, may be held to have committed a joint trespass, and be made jointly liable for the damages caused by such trespass. I have calculated approximately what the mesne profits of these three beegahs are, taking the valuation of the Ameen as the basis of my calculation, and I find that they amount to 41 rupees. Therefore, there will be a decree against the defendants, the heirs of Kanya Dass and defendants Nos. 2 and 3, for 41 rupees out of 489 rupees 3 annas 6 pie; and with respect to the remainder of the mesne profits, namely, 448 rupees 3 annas 6 pie, the appellant is entitled to a decree against Kanya's representatives and against them alone.

It has been further objected by the appellant that he ought to have interest on the mesne profits calculated for each year since the time they have been withheld, which would be for a time anterior to the commencement of the suit.

We think that to succeed in such an application a special case must be made out which has not been done here; but under the authority of *Hurro Persaud Roy vs. Shama Persaud Roy*, I. L. R., 3 Cal., 654, where the Privy Council deals with and approves of the practice of this Court in the matter of interest on mesne profits, we think that the appellant should have interest from the commencement of the suit annually at the rate of six per cent. per annum. Of course that interest will be calculated as against the first three defendants on 41 rupees, and as against Kanya's representatives on the balance, viz. 448 rupees 3 annas 6 pie, and will be added to the amount of claim decreed.

With regard to the costs of the suit the defendant No. 1 objects in his cross appeals that they ought not to pay cost upon a larger amount than the appellant has actually recovered. Defendants No. 2 and 3 object that they ought to recover their costs from the defendant. We think that in the present case the proper order as to costs in the Court below is, that



of the respondents should pay the whole of his own costs. No doubt the plaintiff has, by his plaint, claimed a sum very much in excess of that which he will actually recover, and according to the general rule he would only receive costs calculated upon the amount which he recovers, and would pay costs on that portion of his claim which has proved unsuccessful; but that rule ought not to be applied in the present case. There is no reason to believe that the plaintiff claimed the amount mentioned in his plaint otherwise than in good faith, and on the other hand the respondents are undoubtedly wrong-doers, and for several years, both before this suit and since its commencement, have kept the plaintiff out of possession of his property and have been enjoying its profits. The result of an adherence to the usual rule would be that these wrong-doers, instead of having to pay anything for the wrong committed by them, would actually receive money from the plaintiff.

As regards the costs of this appeal, as neither party has succeeded in respect of the whole of his contention, but each has been partially successful, we think that each party should bear his own costs.

The decree of the Deputy Commissioner will be varied in accordance with the judgment which has been pronounced.

1880

MUDUN  
MOHUN  
SINGH2.  
RAM DASS  
CHUCKER-  
BUTTY.Judgment.WHITE, J.

## [CIVIL APPELLATE JURISDICTION.]

1880  
April 12th.

No. 771 of  
1879

SHORUSSOTI DASI AND ANOTHER . . . . APPELLANTS.

AND

PARBUTTI DASI . . . . . RESPONDENT.

*Enhancement of Rent—Accretion—Notice—Act VIII (B.C.) of 1869, section 14—Regulation XI of 1825, section 4, clause (1.)*

Where land has been added to the jote of a tenant by gradual accretion, the landlord is entitled to an increased rent on account of such accretion on the conditions laid down in Regulation XI of 1825, section 4, clause (1); but before such increased rent can be imposed, it is necessary that a notice should have been duly served in accordance with the provisions of section 14 of Act VIII (B.C.) of 1869.

See *Bokronath Mundul vs. Binodh Ram Sein*, 10 W. R., F. B., 33.

**A**PPEAL against a decision passed by the Subordinate Judge of East Burdwan, modifying the decree of the Additional Moonsiff of Cutwa.

The plaintiff in this case sued for khas possession of certain lands which had accreted to the jote of the defendant, or for a kabulent at the rate of Rs. 35.

It was alleged that the lands, of which khas possession was sought, amounted to 8 beegahs, and that these lands the defendant had been holding without a settlement and without paying rent. Notices, it was further alleged, had been served informing the defendant either to quit, or to make settlements in respect of these 8 beegahs.

The Moonsiff was of opinion that the service of the notice had not been satisfactorily proved; but he held that, in a suit for khas possession, it was not necessary that any notice should have been served. He, however, dismissed the suit on other grounds.

On appeal the Subordinate Judge gave the plaintiff a decree declaring him entitled to a kabulent.

Baboo Gooroo Dass Banerjee, Baboo Boido Nath Dutt, and Baboo Chunder Guffy Moostafce, for the Appellants.

Baboo Chunder Madhub Ghose, and Baboo Umbica Churn Banerjee, for the Respondent.

1880  
SHORUSSOTT  
DASI  
v.  
PARBUTTI  
DASI.

The following judgment of the Court (1) was delivered by

Judgment.

WHITE, J.:—

WHITE, J.

This suit was brought by a lady, Parbutti Dasi, (the respondent before us) for khas possession of certain land, or for obtaining a kabulent by assessment of rent at a rate on that land.

The land appears to be land which has become annexed, by gradual accretion, to a jote in the occupation of the defendant (the appellant before us). The precise nature of the defendant's tenure does not appear, but it seems to have been accepted in the case that he held a tenure, under the plaintiff, of a permanent character.

The land accreted gradually, and I am of opinion that the accretion was annexed to the jote of the defendant, but liable to the payment of rent to the plaintiff on its being shewn that he (the defendant) was, in the language of the Regulation (XI of 1825), by his engagement with the plaintiff, or her predecessors, or by established usage, subject to an increase of rent for the land so annexed.

The first objection taken by the defendant is, that he was not duly served with notice; and an issue was raised by the Moonsiff upon that point. The Moonsiff was of opinion that service of notice had not been proved, but that, having regard to the nature of the suit, no notice was necessary.

The lower Appellate Court on this point remarked: "I think that this case does not come under the Rent Procedure Act, VIII (B.C.) of 1869. The plaint is sufficient notice of demand for khas possession or for a kabulent."

Now, looking to the nature of the case, and to the fact that the land had accreted gradually and had become annexed to the land which was in the occupation of the defendant, I think that the right to recover increased rent in respect of the accretion is a right outside the Rent Procedure Act, and one that must be determined upon the provisions of Regulation XI of 1825, section 4.

(1) WHITE and MACLEAN, J.J.

1880  
 SHORUSSOTI  
 DASI  
 v.  
 PARRYTTI  
 DASI.  
 —  
*Judgment.*  
 —  
 WHITE, J.

At the same time there is a clause in the Rent Act which has been held by this Court to be of general application whenever a superior landholder seeks to make an under-tenant pay an increased amount of rent. It is section 14 which prescribes that no under-tenant or ryot shall be liable to pay any higher rent for the land that he holds than the rent payable for the previous year, unless a written notice is served upon him by order of the Collector in whose district the land is situate at a particular specified time, stating the rent to which he will be subject for the ensuing year and the ground on which an enhancement of rent is claimed. I need only refer to one decision of this Court, namely, the case reported in 10 W. R. (F.B.) 33—*Bokronath Mundul vs. Binodh Ram Sein*.

The notice in the present case is described in the plaint as a notice requiring the defendant to quit the land, or take out a settlement at a proper rate of rent, and is alleged to have been served by the plaintiff on the defendant. Such service was not in accordance with section 14 of the Rent Act, and it is undisputed that the notice did not contain the particulars required by that section. That being so, the plaintiff's suit must be dismissed with costs.

Many other points have been raised at the hearing of this appeal by both parties; but it is unnecessary for us to pronounce a decision upon them. We decide this case on the single ground that no notice was served on the defendant in compliance with the requirements of section 14 of the Rent Act.

The appeals are allowed with costs, and the respondent will pay to the respective appellants their costs in the lower Appellate Court.

MACLEAN, J. MACLEAN, J. :—

I am of opinion that the defendant is entitled to hold the land which has been added to his jote by accretion as part of his jote, subject however to increased rent on account of the accretion on the conditions laid down in Regulation XI of 1825, section 4, clause 1. But before increased rent can be imposed, a notice must be served upon the defendant, informing him of the amount of rent to be imposed, and the grounds upon which it is claimed.

In this case a demand for possession or a kabuleut, at fair and equitable rates, is made, but it only refers to the additional land, and does not mention the amount of rent. The suit is, therefore badly framed, and I concur in dismissing the suit.

1880

## [CIVIL APPELLATE JURISDICTION.]

RAM CHAND BERA (DEFENDANT) . . . APPELLANT;  
AND  
THE GOVERNMENT (PLAINTIFF) . . . RESPONDENT.

April 14th.

No. 504 of  
1879.

*Regulation VII. of 1822, section 14—Enhancement of Jumma of lands situate in town—Collector, Jumma fixed by, to be final—Ejectment.*

Where the Collector has issued due notice of enhancement, under section 14 of Regulation VII of 1822, of the jumma of lands situate in town and subject to that Regulation, and, on failure by the tenant to accept a settlement at the revised rate, an action in ejectment has been brought, the Civil Court has no power to consider whether the new rate of assessment is reasonable, or in any way to interfere with the amount of the revised jumma as fixed by the Collector.

Where the tenant refuses to accept a revised settlement under such circumstances, he is to be entitled to a reasonable time within which to remove a house standing upon the lands in question.

**A**PPEAL from a decision passed by the Officiating Judge of Midnapore modifying the decree of the First Sudder Moonsiff of that district.

Baboo Rash Behary Ghose, and Baboo Bhowany Churn Dutt, for Appellant.

Baboo Unoda Pershad Banerjee, for Respondent.

The facts appear from the following judgment of the High Court (1) which was delivered by

WHITE, J. :—

WHITE, J.

This is an appeal on the part of Ram Chand Bera, the defendant in the first Court, against the decree of the Officiating

(1) WHITE and MACLEAN, J.J.

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 —  
*Judgment.*  
 —  
 WHITE, J.

Judge of Midnapore, dismissing his appeal against a decree of the Moonsiff which ordered the ejectment of the appellant from certain land.

The respondent, who was the plaintiff in the Court of First Instance, is the Government.

It appears that the defendant occupies a certain piece of land in a bazar in the town of Midnapore, on which he has erected a brick built house, alleged by him to be of considerable value; that in 1840 a settlement was made with his ancestors in respect of this piece of land for a term of twenty years by the Collector, at a rent of twelve annas per cottah; and that the Collector has recently, under Regulation VII of 1822, revised this settlement, and fixed upon the land a rent of 5 rupees 8 annas 6 pie per cottah. The defendant has had a notice served upon him by the plaintiff, requiring him to execute a kabulent at the revised jumma, and informing him that if he failed to do so he would be ejected. He also refused to execute the kabulent, or otherwise to accept a settlement at the revised rate, and the Government has, in consequence, brought this action of ejectment against him.

It is to be observed that the land in question does not come within the operation of the Rent Law (Act VIII (B.C.) of 1869). No question, therefore, arises as to how far the Rent Law controls the operation of Regulation VII of 1822.

It is also to be observed that the defendant does not dispute that Regulation VII of 1822 contains the law applicable in this case, or that the land, although situate in a town, and used for a binding site, may be the subject of a revised settlement under section 14 of the Regulation, nor does he dispute the right of the Collector to revise the settlement and enhance the rent, but alleges that the new rate is exorbitant; and that as the Court below has come to no finding, that the rate is reasonable, we ought to remit the case to the Judge for the purpose of determining whether on the revision of the settlement a fair and reasonable rate had been fixed.

This point, I may mention, is not taken in the grounds of appeal; but having regard to the nature of the case, and to the fact that the question affects, as we are told, several other tenants besides the defendant, we have allowed the point to be

argued, and it has been ably agued by the Vakeel who appeared on behalf of the appellant.

The tenure under which the defendant holds the piece of land appears to be of the nature of a mouroosi one, and subject to the right of Government to revise the settlement. It is a tenure which would entitle the defendant to hold the land in perpetuity.

Now, if this had been a case between private parties, and it was found that the landlord had a right such as I have mentioned, there is no doubt but that this Court, having regard to the principles of equity applicable to the case, would not compel a party to accept, on the occasion of revising a settlement, the alternative of paying an increased rent, or of giving up possession of the land without being satisfied that the increased rent was a fair and reasonable enhancement of the rent, and this Court would direct an issue to the lower Court in order to ascertain the point, for it is obvious that under color of enhancing the rent on the occasion of a revision or a renewal of a pottah, such an exorbitant rate might be fixed as practically to oblige the tenant to quit the land, and so deprive him indirectly of his rights of renewal, or his preferential right to have the revised settlement made with him. But this is not a case between two private individuals, but between a private person and Government; and as I read section 14 of Regulation VII of 1822, although the Civil Courts have jurisdiction to enquire into certain points that may arise on the occasion of the revision of a settlement, they are precluded from questioning the amount at which the Collector may fix the revised jumma.

This Regulation does not confer upon Collectors the power of making and revising settlements, but it is framed on the basis that they are already invested with such powers. Amongst other things it imposes upon Collectors certain duties when exercising those powers, and lays down certain rules for their guidance. Section 14, clause 1, has the following proviso:—"Nothing herein contained shall be construed to authorize the Courts to interfere with the decision of the Collector in regard to the amount proportion of jumma to be assessed on any parcel of land, in respect to the quantity and description of land to be assign-

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 Judgment.  
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1880  
RAM CHAND, ed in partition to the holder of any specific share of a joint estate."

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GOVERNMENT. It is argued that this prohibition is limited to the case when the decision of the Collector relates to the extent of the interest belonging to a share, in a village held under a puttidar, or other

Judgment.  
WHITE, J. like tenure. But in my opinion this is not so. The words "nothing herein contained" apply *prima facie* to the whole of

the clause which proceeds it, and their meaning is not, in my opinion, contracted by the context. The first part of the clause directs the Collector, when revising a settlement, to determine and declare in his robokari the nature of the tenure of an occupant and the extent of his interest there in if any dispute exists regarding these matters. The section proceeds thus : " So also when a dispute exists regarding the extent of the interest of a sharer in a village the Collector shall decide the point in the first instance." I understand the meaning to be that his decision in either case, that is to say, whether he is dealing with a single occupant, or a sharer in a village, is to stand good as respects the rights of the parties unless and until the aggrieved party has, by a suit in the Civil Court, established some contrary right, but in neither case may the Civil Court, when settling the right, interfere either with the amount or proportion of jumma assessed by the Collector on any parcel of land. The correctness of this construction is confirmed by the language of the third clause of the section, which enacts that "the decisions passed by the Collector under the above power, if not altered or annulled by the Board or Government, shall be maintained by the Courts, unless, on investigation in a regular suit, it shall appear that the possession held under such a decision is wrongful, and nothing herein contained shall be understood to authorise any Court to interfere with the decision of the revenue authorities relative to the jumma to be assessed on any *mehal* or portion of a *mehal*."

As this Court is precluded from interfering with the amount of revised jumma fixed upon the defendant's holding, we are unable to direct the trial of the issue sought by the appellant.

The decree of the Judge in the Court below declares that the defendant shall be ejected, but makes no reference to the *mehal* which stands upon the land which he occupies.



The Government in their plaint asked for an order that the defendant should remove the house, or if he does not do so, that a direction be given to pull it down. There must be an addition to the decree of the lower Court that the defendant be at liberty to remove this house, and that he have a reasonable time for the purpose, which we fix at four weeks from the 1st of May next.

One of the defendant's grounds of appeal is, that he is entitled to have the full value of his house; but this point has not been urged before us, and there is no ground for the contention.

The appeal will be dismissed with costs, but the decree will be amended by the addition which I have mentioned.

As the defendant's house is described to be a valuable one, and Government is only interested in compelling the defendant to accept the revised jumma or quit the land, Government will probably give the defendant another opportunity of accepting the revised jumma before compelling him to quit.

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MACLEAN, J. :—

MACLEAN, J.

I concur in affirming the decree of the lower Appellate Court, with the addition that the defendant must remove the house within four weeks.

The case is one to which Act VIII (B.C.) of 1869 does not apply, and the defendant must either agree to hold the land on the new terms imposed by the plaintiff, his landlord, or vacate. He has had the option of doing the former, and has not accepted the terms offered. No occupancy rights can be acquired in the land.

## [CIVIL APPELLATE JURISDICTION.]

1880  
May 14th.

No. 41 of  
1879.

BOLAKI LAL (PLAINTIFF) . . . . . APPELLANT;  
AND  
THAKUR PERTAN SINGH AND ANOTHER }  
(DEFENDANTS) . . . . . } RESPONDENTS.

*Mortgage, Execution of money decree upon—Lien.*

A suit having been instituted in the district of B, while Act VIII of 1859 was in force, upon a bond under which lands, both in the district of B and the District of P were mortgaged, a decree was given which, it was declared, should be satisfied by the sale of the whole mortgaged property. No permission was granted by the High Court, as required by that Act, to institute the suit at B.

*Held* that, although by reason of the permission of the High Court not having been obtained as required, the decree must as regards the property in the district of P, be regarded as a money decree only, and could not be executed by sale of the lands in that District, the plaintiff was entitled by a separate suit to enforce his mortgage lien against the property in the Patna district in the hands of a purchaser, whose purchase was prior to his mortgage.

**A**PPEAL from a decision passed by the Subordinate Judge of Patna.

In 1873 the plaintiff instituted a suit against the defendant Sheonundun Pershad in the Court of the Subordinate Judge of Bhaugulpore upon a mortgage bond under which property, not only in the Bhaugulpore district, but also in the Patna district, was included. No leave was obtained from the High Court for the institution of that suit as required by Act VIII of 1859, which was then in force.

The Subordinate Judge granted a decree for the amount due under the mortgage, with interest and costs, in which it was declared that the amount decreed should first of all be recovered from the mortgaged property.

Under this decree the mortgaged property, situate in the Patna district, was attached. The other defendant, Thakur Pertan Singh, intervened and applied to have the property released from attach-

ment, on the ground that he had previously, in good faith, purchased it at an auction sale in execution of a decree of the Patna Court against the same judgment-debtor. It appeared that that purchase was anterior to the plaintiff's mortgage. The property was ordered to be released from attachment. The plaintiff then instituted this suit against Thakur Pertan Singh, and his judgment-debtor, Sheonundun Pershad, to have it declared that he was entitled to have the mortgaged property in the Patna district declared subject to the mortgage lien, and sold under the decree of the Bhaugulpore Court.

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Judgment.

The Subordinate Judge held that, inasmuch as the permission of the High Court had not been obtained for the institution of the suit in the Bhaugulpore Court, that Court had no jurisdiction in respect of the property now in suit. He further held that, so far as the Patna property was concerned, the decree of the Bhaugulpore Court must be treated as a simple money decree, and entitled to rank no higher than the decree under which the defendant Thakur Pertan Singh had purchased. He accordingly dismissed the suit.

The plaintiff then presented this appeal to the High Court.

*Gregory, and Baboo Mohesh Chunder Chowdhry, for the Appellant.*

*M. M. Ghose, and Baboo Nil Madhub Sen, for the Respondents.*

The judgment of the High Court (1) was as follows :—

We are unable in this case to agree with the Court below.

The plaintiff was the mortgagee under a bond of certain property, part of which was situate in the Bhaugulpore district, and part in the Patna district. Upon this bond he brought a suit against his mortgagor, Sheonundun Pershad, in the Bhaugulpore Court, and obtained a decree for the mortgage-money and interest, with a declaration, that the decree should be satisfied by sale of the whole mortgaged property. The permission of the High Court had not been obtained in

(1) GARTH, O.J., and MITTER, J.

1880  
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 TAN SINGH.

*Judgment.*

that suit by the plaintiff, to proceed against the Patna property, and the omission appears to have arisen from a mistaken supposition on the part of the Subordinate Judge, that it was not necessary to obtain it.

The plaintiff then brought a certificate to the Patna Court from Bhaugulpore, and attached the Patna property, situate in that district, under the decree so obtained.

The present defendant then intervened upon the ground that he had previously purchased the same property in execution of another decree of the Patna Court against the same judgment-debtor; and at his instance the property was released from attachment.

The plaintiff then brought this suit to enforce his mortgage lien against the property in the Patna district, upon the ground that his mortgage was prior in date to the defendant's purchase, and consequently that notwithstanding that purchase, the property was subject to the plaintiff's charge, in the hands of the defendant.

There was no doubt that the plaintiff's mortgage was, in fact, prior in date to the purchase by the defendant; but the Subordinate Judge seems to have considered that, as the permission of the High Court was not obtained in the former suit to proceed against the Patna property, and, that as consequently the decree in that Court could not avail the plaintiff to charge that property, his present suit ought also to be dismissed. But this appears to us to be a mistake. The Bhaugulpore Court had jurisdiction, without the permission of the High Court, to give the plaintiff a decree for the amount of the mortgage money and interest, although, it had no power to enforce the decree against the Patna property. So far, therefore, as regards the latter portion of the Bhaugulpore Court's judgment, the decree was *ultra vires*, but was perfectly valid in other respects, and the only effect which it had as regards the money debt was, that it changed the nature of the original debt, which was a bond debt, into that of a judgment debt for the mortgage money and interest.

It is true that the plaintiff, for the reason which we have given, could not enforce his lien against the Patna property.

under the Bhaugulpore decree, but as that property had been sold to a third person, the plaintiff was at liberty to bring his suit against that third person to establish his lien for the mortgage debt and interest, and this was in fact the only way in which he could enforce it against the Patna property.

It will be found that this view which we take is quite in accordance with the judgment of the Court in the case of *Syud Nadir Hossein vs. Pearoo Thovildarinee*, 19 W. R., 255, and we think that it does not conflict with the Full Bench judgment in 14 B. L. R., 409—*Syud Emam vs. Rajcoomar Dass*, or with the judgment of the Court in 1 Calcutta Law Reports, 446, *Sreemutty Dassi Moni Dassi vs. Chowdhry Jonmajoy Mullick*,—in both of which cases it seems to have been taken for granted, that when the mortgaged property has come into the possession of a third person, as it has done in this instance, the mortgagee having obtained a money decree for the mortgage debt, has a right to proceed against such third party to enforce his lien upon the mortgaged property.

The decree of the lower Court will, therefore, be reversed, and the plaintiff will be entitled to enforce his charge for the mortgage money and interest by sale of the mortgaged property in the possession of the defendant. The appellant will be entitled to the costs of both Courts.

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TAN SINGH.  
Judgment.

## [CRIMINAL REFERENCE.]

1880  
May 3rd.

IN THE MATTER OF EMPRESS . . . . .

AND

BUTTO KRISTO DASS AND ANOTHER . . . .

*Presidency Magistrates Act (IV of 1877), section 129—Prosecution of Criminal Case, Right to conduct.*

No person, whether Counsel or Attorney, can claim the right to conduct the prosecution of any criminal case, under the Presidency Magistrates Act, without the sanction of the Presidency Magistrate.

**T**HIS was a Reference under section 240 of the Presidency Magistrates Act (IV of 1877) for the opinion of the High Court upon the following question :—

Under section 129, Presidency Magistrates Act, are Counsel or Attorneys entitled as of right to prosecute cases in the Presidency Magistrates' Courts, or must they obtain the sanction of the Magistrates to do so ?

The opinion of the High Court (1) was expressed in the following judgment :—

In our opinion, under section 129 of the Presidency Magistrates Act, with the exception of the Advocate-General, Standing Counsel, Government Solicitor, or other officer generally or specially empowered by the Local Government on that behalf, no person, whether Counsel or Attorney, can claim the right to conduct the prosecution of any criminal case without the permission of the Presidency Magistrate.

(1) MORRIS and PRINSEP, J.J.

## [CIVIL APPELLATE JURISDICTION.]

KRISHNA CHUNDER CHATTERJEE AND }  
 ANOTHER (DEFENDANTS) . . . . . } APPELLANTS ;

1880.  
 May 10th.  
 No. 1223 of  
 1879.

AND

SATTYA BHAMA (PLAINTIFF) . . . . . RESPONDENT.

*Ejectment—Denial by occupancy tenant of his landlord's title—Estoppel.*

In a suit brought by a landlord against his tenant, who had denied his title and refused to pay rent, the latter by his defence again wholly denied the plaintiff's title. The plaintiff alleged that the defendant had been his tenant for a period of 28 years up to 1279. The Court of first instance passed a decree in favour of the plaintiff. On appeal before the Subordinate Judge, the defendant set up an alternative defence claiming to have acquired an occupancy title.

*Held*, by the High Court, that, by his conduct in denying his landlord's title, the defendant had forfeited the right claimed, and that the plaintiff, who had proved his title and possession within 12 years previous to suit, was entitled to a decree.

**A**PPEAL under section 15 of the Letters Patent against the decision passed by Mr. Justice MACLEAN, reversing a decree of the Subordinate Judge of East Burdwan which affirmed a decree of the Moonsiff of Boodbood.

The plaintiff brought this suit to eject the defendants on the allegation that the land in dispute was sold by the defendants to the plaintiff's husband in 1251, and was thenceforward held by them on payment of rent to her husband and herself down to 1279, a period of 28 years. She alleged that at the end of 1279 the defendants were called upon to quit the land, but refused to do so, and from that time repudiated the plaintiff's title and ceased to pay rent. Hence this suit was instituted to eject them.

The defendants denied the sale and the alleged tenancy.

The Moonsiff found that the plaintiff's title, by purchase and receipt of rent down to some period within twelve years before the institution of the suit, had been established, and he accordingly gave the plaintiff a decree.

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CHATTERJEE  
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BHAMA.  
*Judgment.*

In the lower Appellate Court, the defendants again denied the validity of the plaintiff's title, but they also set up an alternative defence claiming to have acquired an occupancy title. The Subordinate Judge came to the conclusion that by having denied their landlord's title, the defendants had forfeited their right to retain possession, and he therefore dismissed the appeal.

The defendants then preferred a second appeal to the High Court.

Mr. Justice MACLEAN, who heard the appeal, delivered the following judgment:—

I am unable to affirm the judgment of the Court below in this case.

[The learned Judge then stated the facts and continued:—] It appears to me that the plaintiff's suit was misconceived. Assuming the correctness of all that the plaintiff has alleged, she had no right to eject the defendants, or to call in the assistance of the Court to turn them out.

The plaintiff's case was, that the defendants were tenants of upwards of thirty years' standing, though for about five years they had ceased to pay rent. Under these circumstances, if the plaintiff had sued for arrears of rent, coupled with a demand for ejectment, it is very possible that she ought to have obtained a decree, but it is impossible to forget that she has herself proved in the clearest manner that the defendants are ryots with a right of occupancy, and as such ryots can only be ejected in execution of a decree or order under the provisions of Act VIII (B.C.) of 1869, and as there is no provision in that law for ejecting save for non-payment of rent or the termination of a lease, the conclusion to which I come is, that the defendants are not liable to be ejected, simply because they refused to vacate the land at the bidding of the plaintiff's servant.

In this view of the law I must allow this appeal, reverse the decision of the Subordinate Judge, and dismiss the plaintiff's appeal with costs.

From the decision the present appeal, under section 15 of Letters Patent, was preferred.



Baboo *Taruck Nath Sen*, for Appellant.

Baboo *Bama Churn Banerjee*, for Respondent.

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CHATTERJEE  
v.  
SATTYA  
BHAMA.

Judgment.

GARTH, C.J.

The following judgment of the High Court (1) was delivered by

GARTH, C.J. :—

In this case we are unable to agree with the view which the learned Judge has taken.

The plaintiff brought his suit under these circumstances: He says that the defendants sold to him the property in question, of which he is now seeking to recover khas possession, some thirty years ago; that after they had sold it to him, they became his tenants at a certain rent; that from that time up to about five years ago this rent was duly paid; that upon their ceasing to pay him rent, he demanded it from them, but they then told him they were no tenants of his, and that he was not their landlord. In fact they set up an adverse title, and denied that they had ever sold him the land. Consequently, after waiting some time, he brought the present suit to eject them.

Upon this the defendants, not content with their parol disclaimer of the plaintiff's title, set up in their written statement that the kobala, under which they sold this land to him, was a false deed; that they never sold the land at all, nor became the plaintiff's tenants, nor paid him any rent; in fact that they never had anything to do with him; and they then set up an adverse title in themselves.

Upon this written statement the issues were framed, and the trial proceeded. The Moonsiff found that the plaintiff's case was substantially true; that the defendants had repudiated the plaintiff's title; and that the plaintiff was entitled to recover possession on that ground.

In the course of this trial, the plaintiff proved (in fact it forms part of his case to prove), that at one time the defendants for many years were his tenants, and had paid him rent. It was that they paid him rent sometimes in money and sometimes in produce.

(1) GARTH, C.J., and MITTER, J.

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 —  
*Judgment.*  
 —  
 GARTH, C.J.

The defendants then appealed to the Subordinate Judge. They again asserted that the defence set up in their written statement was true, and they contested the case again on the issues raised in the Court of First Instance. But they contended also in the alternative, that if those issues were found against them, they then had a right to turn round, and claim to be the plaintiff's tenants; and as he, the plaintiff, proved that they had been paying rent to him for so many years, they were entitled to a decree in this suit upon the ground that they were occupancy ryots, and that as such they could not be ejected. In fact they tried to take advantage of a plea which they had directly repudiated in the Court of First Instance.

The lower Appellate Court considered that it was not competent for the defendants to set up that defence; that having defended this suit upon the very ground that they were not the plaintiff's tenants, and had nothing to do with him, they were estopped by their own conduct from claiming to be his occupancy ryots.

In this Court, however, the learned Judge appears to have taken a different view. He seems to think that, as the plaintiff proved in the Court of First Instance that for several years the defendants had paid him rent, he had misconceived his suit, and that the course he ought to have taken was to have sued the defendants under the Rent Law for rent and for ejectment. He consequently dismissed the plaintiff's suit with costs.

We are quite unable to take this view of the case. It may be, that if the defendants had merely verbally disclaimed their landlord's title before the suit, and had pleaded their occupancy title when the suit was brought, their parol disclaimer might not have affected their real rights; or even if the defence had been founded upon a *bond fide* mistake, and they had found out their mistake in the course of the trial, and had applied to withdraw their defence and plead their right of occupancy, it is possible that, (subject to any question of costs), they might properly have been allowed to take advantage of their true position.

But that certainly was not the case here. The defendants knowingly and wilfully denied their landlord's title; they repudiated the kobala which they had themselves executed.

they tried their best to defeat his rights and set up an adverse title in themselves.

Under these circumstances we think that by their own conduct they have forfeited the right which they now claim, and that the Court ought not to assist persons who knowingly attempt these frauds.

The rule of English law is, that where, by matter of record, a tenant disclaims his landlord's title and sets up an adverse title either in himself or in some third party, he thereby forfeits his tenancy; but without laying down any absolute rule here with regard to forfeiture in such cases, we think that we are clearly justified, in a case of this kind, in refusing to allow defendants to change the whole nature of their defence at the last moment, and to set up in a Court of Appeal a plea which they had directly and fraudulently repudiated in the Court below (see *Dabee Misser vs. Mungur Meah*, 2 C. L. R., 208). We, therefore, think it right to reverse the decision of the learned Judge of this Court, and to restore the judgment of the Court below. The appellant will have his costs of both hearings in this Court.

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Judgment.

GARTH, C.J.

## [CRIMINAL JURISDICTION.]

CHUNDER NATH SEN . . . . .

AND

RAM DYAL GHUTTUCK AND OTHERS . .

May 28th.

No. 82 of  
1880.

*Criminal Procedure Code (Act X of 1872), sections 521, 523 and 532—Obstruction to thoroughfare or public place—Jury, Duty of, under section 523 of the Criminal Procedure Code—Juror, Removal of.*

In order to give a Magistrate jurisdiction to direct the removal of an unlawful obstruction under section 521 of the Code of Criminal Procedure, the place obstructed must be a thoroughfare or public place; and where this is disputed by the person, on whom notice to remove the obstruction has been served, the decision of the question cannot be referred, under section 523, to a Jury.

A Magistrate ought not, at the instance of one party, and behind the back of the other, to cancel the appointment of a juror, even if such juror be his own nominee.

## [CIVIL APPELLATE JURISDICTION.]

1880  
May 14th.

No. 41 of  
1879.

BOLAKI LAL (PLAINTIFF) . . . . . APPELLANT;  
AND  
THAKUR PERTAN SINGH AND ANOTHER } RESPONDENTS.  
(DEFENDANTS) . . . . . }

*Mortgage, Execution of money decree upon—Lien.*

A suit having been instituted in the district of B, while Act VIII of 1859 was in force, upon a bond under which lands, both in the district of B and the District of P were mortgaged, a decree was given which, it was declared, should be satisfied by the sale of the whole mortgaged property. No permission was granted by the High Court, as required by that Act, to institute the suit at B.

*Held* that, although by reason of the permission of the High Court not having been obtained as required, the decree must as regards the property in the district of P, be regarded as a money decree only, and could not be executed by sale of the lands in that District, the plaintiff was entitled by a separate suit to enforce his mortgage lien against the property in the Patna district in the hands of a purchaser, whose purchase was prior to his mortgage.

**A**PPEAL from a decision passed by the Subordinate Judge of Patna.

In 1873 the plaintiff instituted a suit against the defendant Sheonundun Pershad in the Court of the Subordinate Judge of Bhaugulpore upon a mortgage bond under which property, not only in the Bhaugulpore district, but also in the Patna district, was included. No leave was obtained from the High Court for the institution of that suit as required by Act VIII of 1859 which was then in force.

The Subordinate Judge granted a decree for the amount due under the mortgage, with interest and costs, in which it was declared that the amount decreed should first of all be recovered from the mortgaged property.

Under this decree the mortgaged property, situate in the Patna district, was attached. The other defendant, Thakur Pertan Singh, intervened and applied to have the property released from attach-

ent, on the ground that he had previously, in good faith, purchased it at an auction sale in execution of a decree of the Patna Court against the same judgment-debtor. It appeared that that purchase was anterior to the plaintiff's mortgage. The property was ordered to be released from attachment. The plaintiff then instituted this suit against Thakur Pertan Singh, and his judgment-debtor, Sheonundun Pershad, to have it declared that he was entitled to have the mortgaged property in the Patna district declared subject to the mortgage lien, and sold under the decree of the Bhaugulpore Court.

The Subordinate Judge held that, inasmuch as the permission of the High Court had not been obtained for the institution of the suit in the Bhaugulpore Court, that Court had no jurisdiction in respect of the property now in suit. He further held that, so far as the Patna property was concerned, the decree of the Bhaugulpore Court must be treated as a simple money decree, and entitled to rank no higher than the decree under which the defendant Thakur Pertan Singh had purchased. He accordingly dismissed the suit.

The plaintiff then presented this appeal to the High Court.

*Gregory, and Baboo Mohesh Chunder Chowdhry, for the Appellant.*

*M. M. Ghose, and Baboo Nil Madhub Sen, for the Respondents.*

The judgment of the High Court (1) was as follows :—

We are unable in this case to agree with the Court below.

The plaintiff was the mortgagee under a bond of certain property, part of which was situate in the Bhaugulpore district, and part in the Patna district. Upon this bond he brought a suit against his mortgagor, Sheonundun Pershad, in the Bhaugulpore Court, and obtained a decree for the mortgage-money and interest, with a declaration, that the decree should be satisfied by sale of the whole mortgaged property. The permission of the High Court had not been obtained in

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BOLAKI LAL  
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Judgment.

(1) GARTH, C.J., and MITTER, J.

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*Judgment.*

that suit by the plaintiff, to proceed against the Patna property and the omission appears to have arisen from a mistaken position on the part of the Subordinate Judge, that it was necessary to obtain it.

The plaintiff then brought a certificate to the Patna from Bhaugulpore, and attached the Patna property, situated in that district, under the decree so obtained.

The present defendant then intervened upon the ground that he had previously purchased the same property in execution of another decree of the Patna Court against the same judgment debtor; and at his instance the property was released from attachment.

The plaintiff then brought this suit to enforce his mortgage lien against the property in the Patna district, upon the ground that his mortgage was prior in date to the defendant's purchase, and consequently that notwithstanding that purchase, the property was subject to the plaintiff's charge, in the hands of the defendant.

There was no doubt that the plaintiff's mortgage was, in fact, prior in date to the purchase by the defendant; but the Subordinate Judge seems to have considered that, as the permission of the High Court was not obtained in the former suit to proceed against the Patna property, and, that as consequent upon that decree in that Court could not avail the plaintiff to charge the property, his present suit ought also to be dismissed. This appears to us to be a mistake. The Bhaugulpore Court had jurisdiction, without the permission of the High Court, to give the plaintiff a decree for the amount of the mortgage money and interest, although, it had no power to enforce that decree against the Patna property. So far, therefore, as the latter portion of the Bhaugulpore Court's judgment is concerned, the decree was *ultra vires*, but was perfectly valid in other respects, and the only effect which it had as regards the mortgage money was, that it changed the nature of the original debt, which was a bond debt, into that of a judgment debt for the mortgage money and interest.

It is true that the plaintiff, for the reason which was given, could not enforce his lien against the Patna property.

under the Bhaugulpore decree, but as that property had been sold to a third person, the plaintiff was at liberty to bring his suit against that third person to establish his lien for the mortgage debt and interest, and this was in fact the only way in which he could enforce it against the Patna property.

1880  
BOLAKI LAL  
v.  
THAKUR PER-  
TAN SINGH.  
Judgment.

It will be found that this view which we take is quite in accordance with the judgment of the Court in the case of *Syud Nadir Hossein vs. Pearoo Thovildarinee*, 19 W. R., 255, and we think that it does not conflict with the Full Bench judgment in 14 B. L. R., 409—*Syud Emam vs. Rajcoomar Dass*, or with the judgment of the Court in 1 Calcutta Law Reports, 446, *Sreemutty Dassi Moni Dassi vs. Chowdhry Jonmajoy Mullick*,—in both of which cases it seems to have been taken for granted, that when the mortgaged property has come into the possession of a third person, as it has done in this instance, the mortgagee having obtained a money decree for the mortgage debt, has a right to proceed against such third party to enforce his lien upon the mortgaged property.

The decree of the lower Court will, therefore, be reversed, and the plaintiff will be entitled to enforce his charge for the mortgage money and interest by sale of the mortgaged property in the possession of the defendant. The appellant will be entitled to the costs of both Courts.

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## [CRIMINAL REFERENCE.]

1880  
May 8<sup>th</sup>.

IN THE MATTER OF EMPRESS . . . . .

AND

BUTTO KRISTO DASS AND ANOTHER . . . .

*Presidency Magistrates Act (IV of 1877), section 129—Prosecution of Criminal Case, Right to conduct.*

No person, whether Counsel or Attorney, can claim the right to conduct the prosecution of any criminal case, under the Presidency Magistrates Act, without the sanction of the Presidency Magistrate.

**T**HIS was a Reference under section 240 of the Presidency Magistrates Act (IV of 1877) for the opinion of the High Court upon the following question :—

Under section 129, Presidency Magistrates Act, are Counsel or Attorneys entitled as of right to prosecute cases in the Presidency Magistrates' Courts, or must they obtain the sanction of the Magistrates to do so ?

The opinion of the High Court (1) was expressed in the following judgment :—

In our opinion, under section 129 of the Presidency Magistrates Act, with the exception of the Advocate-General, Standing Counsel, Government Solicitor, or other officer generally or specially empowered by the Local Government on that behalf, no person, whether Counsel or Attorney, can claim the right to conduct the prosecution of any criminal case without the permission of the Presidency Magistrate.

(1) MORRIS and PRINSEP, .J.J.



## [CIVIL APPELLATE JURISDICTION.]

RISHNA CHUNDER CHATTERJEE AND }  
 ANOTHER (DEFENDANTS) . . . . . } APPELLANTS;

1880.  
 May 10th.  
 No. 1223 of  
 1879.

AND

ATTYA BHAMA (PLAINTIFF) . . . . . RESPONDENT.

*Ejection—Denial by occupancy tenant of his landlord's title—Estoppel.*

In a suit brought by a landlord against his tenant, who had denied his title and refused to pay rent, the latter by his defence again wholly denied the plaintiff's title. The plaintiff alleged that the defendant had been his tenant for a period of 28 years up to 1279. The Court of first instance passed a decree in favour of the plaintiff. On appeal before the Subordinate Judge, the defendant set up an alternative defence claiming to have acquired an occupancy title.

*Held*, by the High Court, that, by his conduct in denying his landlord's title, the defendant had forfeited the right claimed, and that the plaintiff, who had proved his title and possession within 12 years previous to suit, was entitled to a decree.

**A**PPEAL under section 15 of the Letters Patent against the decision passed by Mr. Justice MACLEAN, reversing a decree of the Subordinate Judge of East Burdwan which affirmed a decree of the Moonsiff of Boodbood.

The plaintiff brought this suit to eject the defendants on the allegation that the land in dispute was sold by the defendants to the plaintiff's husband in 1251, and was thenceforward held by them on payment of rent to her husband and herself down to 1279, a period of 28 years. She alleged that at the end of 1279 the defendants were called upon to quit the land, but refused to do so, and from that time repudiated the plaintiff's title and ceased to pay rent. Hence this suit was instituted to eject them.

The defendants denied the sale and the alleged tenancy.

The Moonsiff found that the plaintiff's title, by purchase and receipt of rent down to some period within twelve years before institution of the suit, had been established, and he accordingly gave the plaintiff a decree.

1880  
 KRISHNA  
 CHUNDER  
 CHATTERJEE  
 v.  
 SATPYA  
 BHAMA.  
 Judgment.

In the lower Appellate Court, the defendants again denied the validity of the plaintiff's title, but they also set up an alternative defence claiming to have acquired an occupancy title. The Subordinate Judge came to the conclusion that by having denied their landlord's title, the defendants had forfeited their right to retain possession, and he therefore dismissed the appeal.

The defendants then preferred a second appeal to the High Court.

Mr. Justice MACLEAN, who heard the appeal, delivered the following judgment:—

I am unable to affirm the judgment of the Court below in this case.

[The learned Judge then stated the facts and continued:—] It appears to me that the plaintiff's suit was misconceived. Assuming the correctness of all that the plaintiff has alleged, she had no right to eject the defendants, or to call in the assistance of the Court to turn them out.

The plaintiff's case was, that the defendants were tenants of upwards of thirty years' standing, though for about five years they had ceased to pay rent. Under these circumstances, if the plaintiff had sued for arrears of rent, coupled with a demand for ejectment, it is very possible that she ought to have obtained a decree, but it is impossible to forget that she has herself proved in the clearest manner that the defendants are ryots with a right of occupancy, and as such ryots can only be ejected in execution of a decree or order under the provisions of Act VIII (B.C.) of 1869, and as there is no provision in that law for ejecting save for non-payment of rent or the termination of a lease, the conclusion to which I come is, that the defendants are not liable to be ejected, simply because they refused to vacate the land at the bidding of the plaintiff's servant.

In this view of the law I must allow this appeal, reverse the decision of the Subordinate Judge, and dismiss the plaintiff's appeal with costs.

From the decision the present appeal, under section 15 of the Letters Patent, was preferred.

Baboo *Taruck Nath Sen*, for Appellant.

Baboo *Bama Churn Banerjee*, for Respondent.

The following judgment of the High Court (1) was delivered  
y

GARTH, C.J. :—

In this case we are unable to agree with the view which the learned Judge has taken.

The plaintiff brought his suit under these circumstances: He says that the defendants sold to him the property in question, of which he is now seeking to recover khas possession, some thirty years ago; that after they had sold it to him, they became his tenants at a certain rent; that from that time up to about five years ago this rent was duly paid; that upon their ceasing to pay him rent, he demanded it from them, but they then told him they were no tenants of his, and that he was not their landlord. In fact they set up an adverse title, and denied that they had ever sold him the land. Consequently, after waiting some time, he brought the present suit to eject them.

Upon this the defendants, not content with their parol disclaimer of the plaintiff's title, set up in their written statement that the kobala, under which they sold this land to him, was a false deed; that they never sold the land at all, nor became the plaintiff's tenants, nor paid him any rent; in fact that they never had anything to do with him; and they then set up an adverse title in themselves.

Upon this written statement the issues were framed, and the trial proceeded. The Moonsiff found that the plaintiff's case was substantially true; that the defendants had repudiated the plaintiff's title; and that the plaintiff was entitled to recover possession on that ground.

In the course of this trial, the plaintiff proved (in fact it formed part of his case to prove), that at one time the defendants for many years were his tenants, and had paid him rent. It was that they paid him rent sometimes in money and sometimes in produce.

(1) GARTH, C.J., and MITTER, J.

1880  
KRESNA  
CHUNDER  
CHATTERJEE  
P.  
SATYA  
BHAMA.  
Judgment.  
GARTH, C.J.

1880  
 KRISHNA  
 CHUNDER  
 CHATTERJEE  
 v.  
 SATTYA  
 BHAMA.  
 Judgment.  
 GARTH, C.J.

The defendants then appealed to the Subordinate Judge. They again asserted that the defence set up in their written statement was true, and they contested the case again on the issues raised in the Court of First Instance. But they contended also in alternative, that if those issues were found against them, then had a right to turn round, and claim to be the plain tenants; and as he, the plaintiff, proved that they had been paying rent to him for so many years, they were entitled to a decree in this suit upon the ground that they were occupancy tenants, and that as such they could not be ejected. In fact they tried to take advantage of a plea which they had directly repudiated in the Court of First Instance.

The lower Appellate Court considered that it was not competent for the defendants to set up that defence; that having defended this suit upon the very ground that they were not plaintiff's tenants, and had nothing to do with him, they were estopped by their own conduct from claiming to be his occupancy tenants.

In this Court, however, the learned Judge appears to have taken a different view. He seems to think that, as the plaintiff proved in the Court of First Instance that for several years defendants had paid him rent, he had misconceived his suit, that the course he ought to have taken was to have sued defendants under the Rent Law for rent and for ejectment. He consequently dismissed the plaintiff's suit with costs.

We are quite unable to take this view of the case. It may be, that if the defendants had merely verbally disclaimed their landlord's title before the suit, and had pleaded their occupancy title when the suit was brought, their parol disclaimer might not have affected their real rights; or even if the defence had been founded upon a *bona fide* mistake, and they had found their mistake in the course of the trial, and had applied to withdraw their defence and plead their right of occupancy, it might be possible that, (subject to any question of costs), they might properly have been allowed to take advantage of their true position.

But that certainly was not the case here. The defendants knowingly and wilfully denied their landlord's title, and repudiated the kobala which they had themselves executed.

they tried their best to defeat his rights and set up an adverse title in themselves.

Under these circumstances we think that by their own conduct they have forfeited the right which they now claim, and that the Court ought not to assist persons who knowingly attempt these frauds.

The rule of English law is, that where, by matter of record, a tenant disclaims his landlord's title and sets up an adverse title either in himself or in some third party, he thereby forfeits his tenancy; but without laying down any absolute rule here with regard to forfeiture in such cases, we think that we are clearly justified, in a case of this kind, in refusing to allow defendants to change the whole nature of their defence at the last moment, and to set up in a Court of Appeal a plea which they had directly and fraudulently repudiated in the Court below (see *Dabee Misser vs. Mungur Meah*, 2 C. L. R., 208). We, therefore, think it right to reverse the decision of the learned Judge of this Court, and to restore the judgment of the Court below. The appellant will have his costs of both hearings in this Court.

1880  
KRISHNA  
CHUNDER  
CHATTERJEE  
v.  
SATTYA  
BHAMA.  
—  
Judgment.  
GARTH, C.J.

[CRIMINAL JURISDICTION.]

CHUNDER NATH SEN . . . . .

AND

RAM DYAL GHUTTUCK AND OTHERS . .

May 28th.

No. 82 of  
1890.

*Criminal Procedure Code (Act X of 1872), sections 521, 523 and 532—Obstruction to thoroughfare or public place—Jury, Duty of, under section 523 of the Criminal Procedure Code—Juror, Removal of.*

In order to give a Magistrate jurisdiction to direct the removal of an unlawful obstruction under section 521 of the Code of Criminal Procedure, the place obstructed must be a thoroughfare or public place; and where this is disputed by the person, on whom notice to remove the obstruction has been served, the decision of the question cannot be referred, under section 523, to a Jury.

A Magistrate ought not, at the instance of one party, and behind the back of the other, to cancel the appointment of a juror, even if such juror be his own nominee.

1880  
 CHUNDER  
 NATH SEN  
 v.  
 RAM DYAL  
 GHUTTUCK.  
 Judgment.

**C**RIMINAL MOTION to set aside the order of a Magistrate.  
 The facts appear from the decision of the High Court.

Baboo *Bhoobun Mohun Dass*, for the Petitioner.  
 Baboo *Sree Nath Banerjee*, and Baboo *Hurry Mohun Chucker-*  
*butty*, contra.

The judgment of the High Court (1) was as follows :—

This matter has arisen from a complaint made on 15th February 1879, regarding an obstruction to a public thoroughfare.

It appears that a few months before this complaint was made proceedings had been taken under section 521 of the Code of Criminal Procedure, regarding an obstruction to another portion of the same road, and the matter had been referred to a jury under section 523. The report of the jury was not unanimous but the Magistrate, on 6th May 1879, accepted the opinion of the majority, declaring the road was private and not public.

The Magistrate apparently, without the consent of either side directed the same jury to report on the second matter. Shortly after, one of the contending parties objected to one of the jurymen, who had been appointed by the Magistrate on the ground that he had decided the matter against him in the first case. Without giving notice to the other party the Magistrate allowed this objection, and appointed another jurymen in the place of his first nominee. The effect of this was to turn the majority to the other side, and to cause the report to be made in favour of the objector that the road was public and not private.

We are of opinion that the Magistrate should not, at the instance of one party, and behind the back of the other party, have cancelled the appointment of one of the jurors even though such juror was his own nominee. If the objection taken was good, it was equally applicable to all the jurymen who had previously committed themselves to an opinion in the first case.

It is unnecessary, however, to notice this further, because it is clear to us that the entire proceedings have been taken under a

(1) MORRIS and PRINSEP, J.J. •

mistaken view of the law regarding the respective functions of a Magistrate, and a jury under Chapter XXXIX of the Code of Criminal Procedure.

In order to give a Magistrate jurisdiction to direct the removal of an unlawful obstruction from a thoroughfare or public place, it must be first found that the place so obstructed is a thoroughfare or public place. If this be disputed by the party on whom the notice to remove the obstruction has been served, the Magistrate should not refer the decision of this matter under section 523 to a jury. The duty of a jury is declared by that section to be to try whether the Magistrate's order to remove the obstruction is *reasonable and proper*, not whether the way or place obstructed is public or private property. Until this matter has been decided by the Magistrate under section 532 of the Code of Criminal Procedure or by a Civil Court the order under section 521 should not be carried out or referred to a jury, but should be stayed.

If, however, a Magistrate, under a mistaken view of the law, and in spite of the objection raising the question of the right of way, should appoint a jury, then, as pointed out by Mr. Justice PHEAR, in the case of *In re Roy Omesh Chunder Sen*, 21 W. R., Cr. Rul., 64, the order of the Magistrate to remove the obstruction complained of could not be decided by such jury to be reasonable and proper, because, at the outset of their enquiry, they would be met by the *bond fide* objection that the road was private, and not public property. In such a case, they could only submit a report to this effect to the Magistrate, it being no part of their duty to determine the rights of parties in property. The Magistrate ought then either to refer the party complaining to the Civil Court, or in the exercise of his discretion, enquire into the matter as provided by section 532.

We may refer in support of this view of the law to the following cases:—*In re Becharam Bhattacharjee*, 15 W. R., Cr. Rul., 67, decided by LOCH and ONOOCOOL MOOKERJEE, J.J.; *In re Roy Omesh Chunder Sen*, 21 W. R., Cr. Rul., 64; *Pitambar Jugi vs. Nasaruddy*, 25 W. R., Cr. Rul., 4, decided by GLOVER and R. C. MITTER, J.J., and in some proceedings of the

1880  
CHUNDER  
NATH SEN  
v.  
RAM DYAL  
GHUTTUCK.  
Judgment.

1880

Madras High Court, pp. 304 and 305, published by Mr. Wies in his collection of the orders of that Court.

We, therefore, set aside the order of the 12th April, and direct that if the Magistrate finds it necessary to take further action, he do proceed in the manner now indicated.

[INSOLVENCY JURISDICTION.]

June 1st.

IN RE HURRUCH CHAND GOLICHA.

*Insolvency—Adjudication—Gomashta—Trader living beyond the jurisdiction, but carrying on business by a Gomashta within the jurisdiction—Stat. 11 and 12 Vic., cap. 21, section 9—Practice—Affidavit, Time for filing.*

A trader, residing out of the jurisdiction of the High Court, but carrying on business at Calcutta by a Gomashta, can be adjudicated an insolvent under section 9 of Stat. 11 and 12 Vic., cap. 21, if his Gomashta stops payment and closes, and leaves his usual place of business, or does any act, which, if done by the trader himself, would have rendered him liable to be adjudicated an insolvent.

An affidavit, intended to be used to oppose, or shew cause against a motion or petition, is filed in time, if filed on or before the sitting of the Court on the day that cause is in fact shewn, although not filed before the sitting of the Court on the day for which notice was given. A party intending to use an affidavit to oppose, or shew cause against a motion or petition, is not bound to give any notice to the other side.

ON the 22nd of March 1880 one Hurruch Chand, carrying on business at Calcutta, under the name of Hurruch Chand Okhoyram, was adjudicated an insolvent under section 9 of the Indian Insolvent Act, 11 and 12 Vic., cap. 21.

The adjudication was made upon the petition of a creditor Misree Lall, who stated—

1st.—That Hurruch Chand was a trader in Calcutta ;

2nd.—That on the 28th of February 1880, Hurruch Chand had departed from the jurisdiction with intent to defeat and delay his creditors, and with like intent departed from his usual place of business ;

3rd.—That Hurruch Chand was indebted to the applicant ;



—That Hurruch Chand had closed his place of business  
opped all payments. The order of adjudication was served  
kant Khan, the Gomashta of Hurruch Chand, on the  
April 1880.

1880  
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In re  
HURRUCH  
CHAND  
GOLICHA.

Statement.  
——

the 17th of May 1880, Misree Lall obtained an order  
ing the insolvent Hurruch Chand and his Gomashta  
t Khan to attend personally before the Court on the 15th  
1880, and so on from day to day, for the purpose of being  
ed touching the estate and effects of the insolvent.

the 20th of May 1880 notice was served on the attorney  
adjudicating creditor, that on the 25th May an application  
be made on behalf of Hurruch Chand Golicha, who was  
d to be the same person as the Hurruch Chand who had  
djudicated an insolvent, to revoke the order of the 22nd  
and the adjudication thereon. On the same day a peti-  
rified by Hurruch Chand Golicha, and several affidavits in  
: of it were filed, which, if true, proved conclusively that  
h Chand Golicha had, for more than a year, before the  
February 1880, been residing at Azimgunge near Moor-  
ud, and was there on the 28th of February 1880, and  
ot, therefore, have on that day departed from Calcutta  
y intent whatever.

the 25th of May 1880—but whether after or before the  
of the Court did not appear—an affidavit was filed on  
of the adjudicating creditor, in which the deponents  
l that, on the 28th of February 1880, they had attended  
place of business of the firm of Hurruch Chand Okhoÿram,  
and payment of sums due to their employers, and that  
d been informed by Nilkant Khan, the Gomashta of the  
at the business had failed and was closed, that his *Malik*  
pal) had absconded, and that the creditors of the firm could  
efore be paid.

ing to the time of the Court being occupied by other busi-  
e application to revoke the adjudication did not come on  
ard till the 1st of June 1880.

hat day Jackson appeared for the insolvent ;

ed for the adjudicating creditor ; and

edy to watch the case on behalf of the Official Assignee.

1880  
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*In re*  
 HUBBARD  
 CHAND  
 GOLIGHA.  
 ~~~~~  
*Argument*  
 ~~~~~

*Jackson*, for the insolvent urged that the adjudication had been obtained upon an affidavit which alleged only one fact upon which the adjudication could have been legally grounded, the fact namely that the insolvent had, on the 28th of February 1880, departed from the jurisdiction with intent to defeat and delay his creditors and that fact was distinctly negatived and disproved by the verified petition and affidavits filed on behalf of his client. As to the affidavit in reply which he understood Mr. Piffard intended to attempt to make use of, he submitted first that the Court could not look at it as it was not shown to have been filed before the sitting of the Court, on the day on which notice had been given that the application to set aside the adjudication would be made. He also contended that the affidavit could not now be used inasmuch as it contained grounds of opposition to the petition to revoke the adjudication of which no notice had been served upon his client.

*Piffard*.—This application to set aside the adjudication is too late. It is true that the Indian Act does not, like the English one, specify any particular limit of time within which an application to set aside an adjudication must be made, but it must be made within a reasonable time. In England an application to set aside an adjudication must be made within twenty-one days. No time is fixed by the Indian Act, but, it is submitted, that an application of this kind must be made within reasonable time. In the present case, notice that such an application was to be made was first given on the 20th of May, only two days less than two months after the order of adjudication and a month and five days after service of it upon the insolvent. This is not the case of a prosperous and honest trader who, by mistake or fraud, or malice, has been unjustly, and without evidence and notwithstanding that he is really perfectly solvent, adjudicated insolvent, and who comes into Court directly he hears that proceedings have been taken and an order made prejudicial and destructive to his credit. He does not deny that he had, on the 28th of February, a trading business in Calcutta, which has been closed from that day and all payments stopped. He does not deny that he is an insolvent, or allege that he is able and willing to pay his just debts. He relies simply on the fact that the

adjudicating creditor was mistaken in saying that he Hurruch Chand, or Hurruch Chand Golicha had been personally present at Calcutta till the 28th of February, and had, on that day, left the jurisdiction for the purpose of defeating or delaying his creditors, and it is not without significance that the insolvent apparently treated the order and the proceedings with indifference, until he and his Gomashta were ordered to attend in Court, and be examined as to his estate and effects, and that three days after the making of this order, notice is first served of this application. If no new case in reply had been made, or if the affidavits in reply were inadmissible, the application should be dismissed with costs. But, it is submitted, the affidavits in reply are admissible under rule 476 in Mr. Belchambers' book, no notice being necessary under rule 478. The affidavit in reply was filed in this Court on the 25th of May—whether before or after the sitting of the Court, is immaterial, as it has now been filed in the Court seven days before this the day on which the application is in fact made and cause shewn against it. That affidavit shows an act of bankruptcy, committed at Calcutta, by the Gomashta, by and through whom the insolvent carried on his Calcutta business.—*Qui facit per alium facit per se.* Carrying on business within the jurisdiction by a Gomashta makes his principal subject to the jurisdiction of a Civil Court, and must equally make him subject to the jurisdiction of the Insolvent Court, (*In re Howard Brothers*, 11 B. L. R., 254. See also *In re Tariny Churn Goho*, 11 B. L. R., App. 26.)

As a matter of fact, a principal is so frequently in this country a person who, except enjoying its profits, has no concern with, and takes no active part in, the management of the business carried on in his name, that the legitimate operation of the law of insolvency would be defeated, and it would become impossible to obtain an adjudication against any native unless an act of bankruptcy, committed by a Gomashta, were treated as the act of his principal, unless and until the latter showed that he had neither authorized nor ratified the act, and that he was not in fact in insolvent circumstances.

1880  
 In re  
 HURRUCH  
 CHAND  
 GOLICHA.  
 Argument.

1880  
 —  
*In re*  
**HURRUCH**  
**CHAND**  
**GOLICHA.**  
 —  
*Judgment.*  
 —

The judgment of Mr. Justice Broughton, after shortly stating the facts as above, was as follows :—

This is a petition to set aside an order, dated the 22nd of March last, adjudicating Hurruch Chand Golicha, an insolvent under the 9th section of the Indian Insolvent Act, 11 and 15 Vic., c. 21. The adjudication was made upon the petition of the creditor Misree Lall, who stated—

- (1.) That Hurruch Chand was a trader in Calcutta.
- (2.) That on or about the 28th of last February, Hurruch Chand departed from the jurisdiction with intent to defeat and delay his creditors, and with like intent departed from his usual place of business.
- (3.) That Hurruch Chand was a debtor to the applicant.
- (4.) That Hurruch Chand has closed his place of business, and stopped all payments.

Mr. Jackson now read a petition and affidavit, which state that Hurruch Chand was, and has lived all along, at Azimgunge, not in Calcutta, and that it is therefore not true that he departed from the jurisdiction with intent, etc., but admit that he carried on business by a Gomashta, and do not deny that the place of business has been closed.

On these facts, without reference to an affidavit in answer, filed a week ago by the petitioning creditor, and I think properly available to him in this inquiry, two questions have arisen : (1) a question of construction, and (2) a question of practice.

The first question is, whether a trader, who trades by a Gomashta, can be adjudicated an insolvent, if the Gomashta commits an act of insolvency ?

If he cannot, there must be numerous cases in which native traders in this city cannot be adjudicated insolvent at all; for nothing is more common than for a trader, living in the Mofussil and scarcely ever visiting Calcutta, to leave an extensive business in the hands of his Gomashta, who has the fullest authority, and who carries on the whole business on his behalf.

There are two ways in which a man may become insolvent :—He may himself petition under section 5, or a creditor may petition under sections 8 or 9 of the Insolvent Act.

Under section 5, the petitioning insolvent must "reside within the jurisdiction"; but it has been held more than once—and very recently held—that residence within the meaning of this section may mean carrying on business in Calcutta, although at the time not actually dwelling within the limits of Calcutta—*Tarini Churn Ghose*, 11 B. L. R., App. 26; in the matter of *Robert Carr*, decided 1st July 1873—both cases decided by PONTIFEX, J. There are several cases to the same effect cited in *Clarke and Millett's Insolvency in India*, p. 13, from the records of the office of the Official Assignee.

If the 5th section can bear this construction a similar construction can be put on the words "depart from the limits of the jurisdiction" and "depart from his usual place of business within the jurisdiction." It requires, indeed, no departure from the literal meaning of the words to hold that when a trader has established a business through a Gomashta he departs from the place of his business, if his Gomashta departs, and if he does not come himself, or send some one else to carry on the business. If, as in this case, the Gomashta shuts up the place of business and stops payment, he does in fact depart from his usual place of business, for the usual place of business is inside his house where the business is carried on, and not outside his house with the door locked behind his back, and when he shuts the place up and stops payment, he departs from his usual place of business with intent to defeat, or delay his creditors.

It has been held that a trader non-resident, whose Gomashta acts in this way, may be adjudicated an insolvent—*Cullumjee Monjee*, Coryton, 8—a case decided by Sir C. JACKSON, J., in 1858.

There it was alleged that the Gomashta had departed from the usual place of business, and the principal was adjudicated an insolvent, "unless the Gomashta shall, within 8 days from the service of this order upon him, show good cause to the contrary."

I think, therefore, that the petition, upon which adjudication has been made, is true when the words are construed as they have already been construed. The trader was present by the Gomashta, and by his Gomashta he absented himself.

It appears to me, therefore, that the question of practice need

1880

In re

HURBUON  
CHAND  
GOLCHA.

Judgment.

1880  
*In re*  
 HURBUCH  
 CHAND  
 GOLICHA.  
 Judgment.

not be determined, that question being whether, supposing the adjudication to have been on a defective petition, it ought to have been set aside, when on further evidence it appears that the trader has made himself liable to be adjudicated an insolvent.

But I think that such further evidence can be taken into consideration on an application to set aside the adjudication.

In the present case the further facts appear upon the petition of the insolvent, the affidavit filed in support of it, and the affidavit in reply. Mr. Jackson argues that the affidavit in reply cannot be used, because it was not sworn until after the Court sat to dispose of the case last week, when the case should have come on to be heard. But it was filed on that occasion, and it has now been filed for a week. This is all that is required by the rules of practice Rules 476 and 498, Belchamber's Rules and Orders, p. 212. The insolvent had an opportunity of seeing the affidavit in answer, if he desired to do so.

I think, therefore, that this petition must be dismissed, and that the adjudicating creditor may add his cost of opposing it to this debt, and that the costs of the Official Assignee ought to be paid out of the estate.

#### [CIVIL APPELLATE JURISDICTION.]

May 17th. NANUK PERSHAD (PETITIONER). . . . . APPELLANT;  
 No. 76 of 1880. AND  
 NITEA LALL (OBJECTOR). . . . . RESPONDENT.

*Appeal—Certificate under Act XXVII of 1860, Order refusing to recall, not appealable.*

There is no appeal from an order by a District Judge refusing to recall a certificate granted under Act XXVII of 1860.

APPEAL from an order passed by the Judge of Bhaugulpore.  
 This was an application by one Nanuk Pershad to have recalled a certificate which had been granted to Nitea Lall, under Act XXVII of 1860, on the ground that the latter was only an agent of the deceased Gurn Pershad, while he (the applicant) was Gurn Pershad's sister's son.

The District Judge refused the application, whereupon the present appeal was preferred to the High Court.

Mr. R. E. Twidale, for Appellant.

Baboo Mohesh Chunder Chowdhry, and Baboo Chunder Madhub Ghose, for Respondent.

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Mr. R. E. Twidale quoted the following cases :—*Goonomonee Dossee vs. Bhabo Soonduree Dossee*, 18 W. R., 258, and *Mussamat Bheekun vs. Mussamat Elahee Khanum*, 11 W. R., 153, in support of the application.

The judgment of the Court (1), which was as follows, was delivered by

WHITE, J. :—

WHITE, J.

This is an appeal against an order of the District Judge refusing an application which was made by the appellant to recall a certificate which had been granted to Lalla Nitea Lall, the respondent, under Act XXVII of 1860, and to grant under that Act a certificate to the appellant to collect the debts of one Furru Pershad, deceased.

We think that in such a case as this no appeal lies to this Court. A District Judge appears to have jurisdiction to entertain an application to recall a certificate which he has granted, though it is by no means clear from the cases which have been cited what is the basis of his jurisdiction, for Act XXVII of 1860, which alone gives him jurisdiction to grant a certificate, altogether silent on the subject.

But whatever may be the origin of his jurisdiction, we are of opinion that where he has refused to recall a certificate which he has granted, no appeal lies. The Act of 1860 of course gives no appeal, and looking to the nature of the proceeding, the order being one merely of refusal, does not seem to be of an appealable character. An application to recall a certificate is in the nature of an application to the Judge to review his former decision, and when he refuses the application, he does not appear to do more than decline to alter his first decision.

The appeal is dismissed with costs.

(1) WHITE and MACLEAN, J.J.

## [ORIGINAL CRIMINAL JURISDICTION.]

1880  
May 13th.

EMPRESS *vs.* HARAN CHUNDER MITTER, GOPAL CHUNDER MITTER AND UMBICA CHURN CHUCK. ERBUTTY.

*Cross-examination—Depositions before the Magistrate—Discrepancies.*

In a trial before a Sessions Court the attention of the Jury may be called to discrepancies between the evidence given by witnesses in such Court and that given before the Committing Magistrate without the depositions before the Magistrate being put in.

*Hill and Souttar* for the prosecution.

*Piffard* for the 1st and 2nd prisoners.

*Trevelyan* for the 3rd prisoner.

IN the course of the cross-examination of one of the witnesses for the prosecution, Mr. Trevelyan asked the witness whether he had made certain statements before the Magistrate.

WILSON, J. :—You need not ask that question, as the depositions show what the witness said before the Magistrate.

Trevelyan.—If your Lordship considers that I can comment to the Jury upon differences between the evidence here and that given before the Magistrate, without putting these questions or without putting in the deposition taken before the Magistrate, I do not wish to press the question.

WILSON, J. :—

You are entitled to draw the attention of the Jury to these differences without putting in the deposition, and I shall put them out to the Jury.



## [CIVIL APPELLATE JURISDICTION.]

FATIMUNNISSA BEGUM } (OBJECTORS) APPELLANTS;  
AND OTHERS . . . . . }

AND

MIR HAMZA ALI AND } (PETITIONERS) RESPONDENTS.  
ANOTHER . . . . . }

1880  
April 30th.  
No. 163 of  
1879.

*Probate—Mahomedan Will—District Court.*

A District Court has no jurisdiction to admit the will of a Mahomedan to probate.

**A**PPEAL from a decision passed by the District Judge of Patna.

In this case the petitioners applied that the will of a Mahomedan lady, named Jigri Begum, might be admitted to probate. It was objected that the testatrix was not in her proper senses at the time of the execution. The District Judge upon the evidence considered that the will had been duly executed by the deceased, and he admitted it to probate.

In appeal from the order of the Judge it was contended that the District Judge had no power to grant probate of the will of a Mahomedan.

Moonshee *Mahomed Yusoof*, for the Appellants.

Moonshee *Serajul Islam* for the Respondents.

The judgment of the High Court (1) was follows:—

The order of the lower Court, granting probate in this case, must be reversed, as that Court had no power to grant it. But as the point was not taken in the Court below, we think that each party should pay his own costs of this appeal.

(1) GARTH, C.J. and MITTER, J.

## [CRIMINAL JURISDICTION.]

1880.  
June 4th.

No. 115 of  
1880.

IN THE MATTER OF A REFERENCE FROM THE CHIEF PRESIDENTIAL MAGISTRATE.

*Indian Penal Code (Act XLV of 1860), sections 213, 214 and 406—Compounding offences.*

The offence of criminal breach of trust, under section 406 of the Indian Penal Code, cannot, under the terms of sections 213 and 214 of the same Code, be lawfully compounded.

**T**HIS was a reference under section 240 of the Presidency Magistrates Act, submitted by the Chief Presidential Magistrate for the opinion of the High Court on the following question, viz:—Is the offence of criminal breach of trust, under section 406 of the Indian Penal Code, an offence that can be lawfully compounded?

The opinion of the Court (1) was as follows:—

In our opinion the offence of criminal breach of trust, being one into which the element of dishonesty enters, that offence cannot, under the terms of sections 213 and 214 of the Indian Penal Code, be lawfully compounded.

(1) JACKSON and TOTTENHAM, J.J.

## [CIVIL APPELLATE JURISDICTION.]

ARAN CHUNDER BANERJI AND ANOTHER } APPELLANTS;  
 (PLAINTIFFS) . . . . . }  
 AND  
 TURBO MOHUN CHUCKERBUTTY } RESPONDENT.  
 (DEFENDANT) . . . . . }

1880  
 May 12th.  
 No. 32 of  
 1879.

*Hindu Law—Adoption (of grandson of cousin)—Dattaka Chandrika, section II, paras. 7 and 8—Dattaka Mimansa, section V, para. 20—"Reflexion of a son."*

The rule deduced from the Dattaka Mimansa, section V, para. 20, and Dattaka Chandrika, section II, paras. 7 and 8, that a person cannot be validly adopted with whose mother the adoptive father might not have lawfully intermarried while she was yet unmarried, does not prevent the adoption of a cousin's grandson.

*Mrino Moes Debeah vs. Bejoy Kishto Gossamee*, W. R., Sp. No., p. 122, followed.

The meaning of the words "reflexion of a son," Dattaka Mimansa, section 5, para. 20, and Dattaka Chandrika, section 2, paras. 7 and 8, discussed.

APPEAL from a decision passed by the First Subordinate Judge of the 24-Pergunnahs.

In this case the plaintiffs sought to recover possession of certain property in the hands of the defendant Kedarnath Banerji, who professed to be the adopted son of Nobo Krishna Banerji, deceased. Nobo Krishna, it seems, died in Aughran 1279, leaving a will, dated 22nd Aughran 1279.

The plaintiffs sought to impugn the genuineness of this will, and to set aside the adoption of Kedarnath as invalid, on the ground that at the time of his adoption there was in existence one Bissessur who had already been adopted by the deceased. It appeared that Nobo Krishna had first of all adopted Ram Tarun, and then on his death leaving a widow Makhuda Debi, he adopted Bissessur.

This Bissessur was the grandson of Ram Joy, the first cousin of Nobo Krishna. Kedarnath was subsequently adopted, when

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the question of the validity of Bissessur's adoption was raised. The plaintiffs claimed the property left by Nobo Krishna as the heirs of Bissessur, who died on the 22nd Pous 1283.

The Subordinate Judge held that the adoption of Bissessur was invalid, and dismissed the suit.

From his decision the plaintiffs preferred this appeal.

Baboo Golab Chunder Sircar, and Baboo Opendro Chunder Bose, for the Appellants.

Baboo Troilukhynath Mitter, and Baboo Bhubany Churn Dutt, for the Respondents.

Baboo Golab Chunder Sircar contended that the question to be decided was, whether the adoption of Bissessur was valid or not, that is, whether by Hindu law, a brother's or a paternal cousin's grandson might be adopted. The general rule was, he urged, that a person could not be validly adopted whose mother the adopter could not have married while she was yet a maid. In the present case it could not be said that Nobo Krishna could not have married Bissessur's mother while she was yet unmarried—*Gopal Narhar Safray vs. Hanmant Ganesh Safray*, I. L. R., 3 Bom., 273, see p. 293; see also *Jivani Bhai vs. Jivu Bhai*, 2 Mad. H. C. R., 462.

Among Sudras, however, the adoption of a mother's sister's son was valid, although the adopter in such a case could not have married the mother of the person adopted—*Chinna Nagayya vs. Pedda Nagayya*, I. L. R., 1 Mad., 62.

In the case of *Mrino Moea Debeah vs. Bejoy Kishto Gossamee*, W. R., Sp. No. 122, it was held that the adoption of a grand-nephew was not repugnant to Hindu Law. That is a direct authority in favour of the adoption of Bissessur.

Then if the adoption of Bissessur be held to be valid, the subsequent adoption of Kedarnath was an illegal and void act—*Rungama vs. Atchama*, 4 Moore's I. A., 1; *Gopee Lall vs. Mussamut Sree Chundraolee Baboojee*, 19 W. R., 12; *Sudanand Mohapatrer vs. Bonomalee*, 2 Hay, 205.

Baboo Troilukhynath Mitter.—The lower Court has held that Bissessur was not one who bore "the reflexion of a son," and

but that being so, he could not have been legally adopted by Nobo Krishna.

No judicial interpretation has yet been given of the words "reflexion of a son."

The authors of the "Dattaka Mimansa," section V, paras. 15 to 20, and of the "Dattaka Chandrika," section II, paras. 7 and 8, both agree that these words mean "the resemblance of a son, or the capability to have been begotten by the adopter, through appointment and so forth." Now, a cousin's grandson "bears the resemblance" of a grandson rather than of a son.

[JACKSON, J.—But the word "son" may here mean *son*, and *the rest* (adi).]

There is no authority for saying that the words "reflexion of a son" are to be restricted to the rule that a man must not adopt a child whose mother, while a virgin, he might not have married.

In the "Dattaka Chandrika," section I, para. 10, it is said that the adoption of a son must be from among Sapindas, but there are many Sapindas who cannot be adopted, *e.g.*, a brother, a daughter's son, and it is only such Sapindas as bear the "reflexion of a son" who can be adopted.

[JACKSON, J.—What do you understand by reflexion or resemblance of a son?]

I understand it to indicate a second degree of relationship, although there is no precise rule to that effect in the books which treat of adoption.

The ancient custom of appointment could take place between a female and her husband's brother, and in that case the sons born would resemble sons of the husband. As to what persons might raise issue by appointment, see Dig. II, pp. 581, 2, 4, (1st edition).

The strongest authority against me is the case of *Mrino Moe Deeah vs. Bejoy Kishto Gossami*, W. R., Sp. No. 121; but in that case there were two points, viz., whether a grand-nephew could be adopted, and whether an adopted son could succeed to his adoptive mother's grandfather's estate when there were collateral heirs. The case was disposed of upon the second point. The decision, therefore, on the other point was not necessary, and can only be taken as an expression of opinion.

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 —  
*Judgment.*

The case of *Gopal Narhar Safray vs. Hanmant Ganesh Safray*, I. L. R., 3 Bom., 273, is not an authority.

[JACKSON, J.—It is an authority for the rule that no one can be adopted whose mother the adopter could not have married.]

The Madras case—*Chinna Nagayya vs. Pedda Nagayya*, I. L. R., 1 Mad., 62, is not a direct authority against me.

Baboo Golab Chunder Sircar in reply.

The judgment of the High Court(1) was as follows :—

The appellants instituted this suit to recover from the defendant, who claims to be the adopted son of the late Nobo Krishna Banerji, the whole of the estate of the latter, they being in default of direct heirs entitled, by Hindu law, to succeed to it. They seek to have the adoption set aside, as also a will which was executed by Nobo Krishna. They contend that the adoption of the defendant Kedarnath was invalid, because at the time of its taking place Nobo Krishna already had an adopted son named Bissessur still living, and could not lawfully adopt another. Bissessur having died subsequently to Nobo Krishna, plaintiffs claim to be the next heirs to the estate.

Nobo Krishna, it appears, adopted three sons successively. The first, Ram Tarun was married, and died leaving his widow Makhuda Debi. Nobo Krishna next adopted Bissessur who was the grandson of his cousin Ram Joy Banerji.

Subsequently a question was raised as to the legality or validity of this adoption, on the ground that a brother's or cousin's grandson could not be adopted. Nobo Krishna, having had doubts suggested to him as to the validity of this adoption, proceeded to adopt Kedarnath the defendant in this suit: and further he made a will in which he described both the boys as his sons, and made provision for each of them. He made three divisions of his property; one division he gave for the maintenance of the two sons. As regards Bissessur a condition was attached, that should he not, after coming of age, reside in the dwelling house of the testator, he should not get the property.

The second division was dedicated to family idols, Makhuda

(1) JACKSON and TOTTENHAM, J.J.

Debi, the widowed daughter-in-law, being appointed *sebait* with the option of appointing one or other of the two adopted sons to succeed her in that capacity. The third division ¶ was to be dispensed by the executrix of the will, Makhuda Debi, for various religious ceremonies. Bissessur died during his minority. Makhuda Debi is also dead, and did not appoint Kedarnath to be *sebait* of the debuttur property.

For the defence it was contended that the adoption of Bissessur was invalid for the reason above mentioned, viz., that as grandson of a cousin he was not eligible for adoption; and that, consequently, the defendant Kedarnath's adoption was good, and he is entitled, independently of the will, to inherit the estate of Nobo Krishna, and it was contended, that independently of the adoption, he is entitled under the will to hold the whole estate, and that the plaintiffs get nothing as heirs of Bissessur. The case came on for trial before the Subordinate Judge of the 24 Pergunnahs. The material issues on the merits were, whether the will of Nobo Krishna, of which probate has been granted, could be questioned in this suit; whether the ceremonies enjoined by the Shastras had been duly performed at the defendant's adoption; whether the adoption of Bissessur was valid or not; and whether if defendant's adoption be invalid, he is entitled under the will to retain the property. The Subordinate Judge disposed shortly of all the issues except that which raises the question of the validity of the adoption of Bissessur. If that adoption was valid, the defendant Kedarnath was not a legally adopted son. If Bissessur was not legally adopted, then Kedarnath's title cannot be assailed: for, that all the proper forms and ceremonies were observed in regard to him was found by the lower Court, and has not been denied before us, though a denial of it was set out in the memorandum of appeal. The lower Court discussed, at great length, the issue touching the validity of Bissessur's adoption, and came to the conclusion that it was invalid. It considered that upon the correct interpretation of certain passages in the "Dattaka Chandrika" and "Dattaka Mimansa," it must be held that a boy cannot be adopted by Brahmin unless he be of the same generation as the intending adopter's son would be. The Subordinate Judge relied much

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upon what he conceives to be the true meaning of the somewhat vague phrase "the boy bearing the reflexion of a son," which occurs in one of the verses in which the ceremonial rites of adoption are prescribed, as showing that an adopted son cannot be chosen from a generation more than one degree below the adopter. He observes that a grand-nephew bears the reflexion of a grandson rather than that of a son.

In coming to the conclusion, which he did upon this point, the Subordinate Judge has been chiefly guided by considerations as to whether there could be an appointment (in the technical sense of Hindu law) as between the person wishing to adopt, and the mother of the boy to be adopted. This he considers to be the only test, because the meaning of the phrase "reflexion of a son" is explained by the commentators to be "the capability to have been begotten by the adopter through appointment and so forth—" *Vide* "Dattaka Chandrika," section II, paras, 7 and 8, and "Dattaka Mimansa," section V, paras, 15, &c.

The generally accepted rule deduced from this explanation is, that the adopted son's natural mother must be one with whom the adoptive father might have lawfully inter-married while she was yet unmarried—*Vide* Sutherland's Synopsis; and "Dattaka Mimansa," section V, para. 20; and this rule has been thought to receive support from the prohibition contained in the books from adopting a daughter's son, a sister's son, and the son of the mother's sister—*Vide* "Dattaka Chandrika," section I, para. 11. There are no doubt exceptions to this rule expressly provided in the prohibition to adopt paternal and maternal uncles. For the "uncle" may be the *step uncle*, and therefore the son of one who might lawfully have been married to the man desiring to adopt. But because of these exceptions, the Subordinate Judge rejects the generally-accepted rule which has been judicially affirmed by the High Courts of Madras and Bombay in several reported cases, and for the rejection of which no authority exists in any case decided by this Court, or by the Judicial Committee of the Privy Council—*Vide* *Chinna Nagayya vs. Pedda Nagayya*, I. L. R., 1 Madras, 62; *Jivayi Bhai vs. Jivu Bhai*, 2 Mad. H. C. 462; *Gopal Narhar Safray vs. Hanmant Ganesh Safray*, I. L. R., 3 Bombay, 273.



The Subordinate Judge did not overlook the fact that, in deciding that a brother's or cousin's grandson could not legally be adopted, he was acting in direct opposition to a decision of three former Judges of this Court in the case of *Morun Mose Debeah vs. Bejoy Kishto Gossamee*, W. R. Sp. No. p. 122. He considered himself not bound to follow this decision, because independently of that question that case was disposed of upon another point, which rendered it unnecessary to determine whether the adoption was valid or not, and also because, as he notes, the case was not a Full Bench case, properly so called. Whether necessarily or not, however the question was decided, and the three Judges were unanimous in their opinion. We cannot doubt that they came to that opinion after careful deliberation; for the point was one upon which the two Courts below had differed, and upon which the opinions of the Pundits, accepted as correct by the First Court, were not in accordance with the view adopted in this Court.

The decision therefore, even if it has no more legal force than an expression of opinion, is entitled to very great weight, more especially as one of the Judges was Mr. Justice SUMBHOO NATH PUNDIT. We think that the Subordinate Judge would have done well to follow this opinion, and the general course of decisions as to who is eligible for adoption, and that his contrary view must be overruled in this case. We observe that it was not open to the Subordinate Judge to question a decision of this Court, because it is not a "Full Bench case." We think it by no means clear that the phrase "the reflexion of a son," was intended to bear the limited signification which he has put upon it; and looking to the place in which it is found, we think it is very questionable whether it was intended to limit the generation from which a son might be adopted, or as anything more than a descriptive epithet applied to the child adopted. The phrase, as has been said, occurs only in the portion of the book which prescribes the ceremonial, and not in the part which lays down rules as to the selection of a son. Had the Lawgiver intended to limit the choice to the one generation, next below the intending father, he would surely have laid it down distinctly and not left it to be doubtfully, and with much dispute, evolved

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*Judgment.*

from an epithet applied to the child in the verses describing the ceremonies to be performed, and as to whom those ceremonies have been nearly completed. The passage has no doubt provoked discussion and difference of opinion amongst the Pundits, but so far as either common sense or any judicial authority goes, there is no ground for holding that a grand-nephew or a cousin's grandson, when adopted, does not equally, with a nephew, bear the reflexion of a son. We prefer, therefore, to follow in the course pursued by the Courts hitherto, and to hold that the adoption by Nobo Krishna Banerji of Bissessur was valid. So far, therefore, as the Subordinate Judge's decision in this suit is based upon the finding that Bissessur was not legally adopted, and that defendant Kedarnath was, it must be set aside; and the plaintiffs being admittedly the heirs of Bissessur will have a decree for all the property subject to the rights of Kedarnath, if any, under the will of Nobo Krishna. The provisions of that will have been mentioned above, and that it is a valid will was found by the lower Court, and has been conceded by the Vakeel for the plaintiffs before us. For the plaintiff it is contended that under the will the defendant is only entitled to retain his half of the property ₹. The lower Court held that this was his bequest independently of his position as adopted son. That Court also held him to be entitled to possession as *sebait* of the property ₹, because, whereas power was given to Makhuda Debi to adopt one or other of Bissessur and Kedar to be *sebait* after her, Bissessur had died, and she must be supposed to have appointed Kedar. The remaining property over which Makhuda was appointed manager as executrix under the will the lower Court held to be Kedar's by inheritance as adopted son.

As our decision deprives him of this status, he must give up the last-named property. As to ₹ we find that it was optional with Makhuda Debi to appoint Kedarnath or not; and she did not appoint him. She was not bound to appoint either him or Bissessur. We do not, therefore, agree with the lower Court in holding that, because the latter is dead, the former must be supposed to have been appointed. But the property being *debuttur*, the plaintiffs have no right to obtain possession of it

unless Makhuda having omitted to appoint a *sebait*, the Court, for special reasons, sees fit to appoint them to fill that office. There is nothing before us which induces us to consider them more fit to be *sebait*s than the defendant Kedarnath, who is at present in possession, and who is one of the two whom Nobo Krishna designated as the persons between whom the selection might be made. We decline, therefore, to disturb him in the present suit.

As regards the property ₹, the defendant has taken objection to the finding of the Subordinate Judge that one-half of it vested absolutely in Bissessur, and upon his death became the property of his heir. If this be correct, the plaintiffs are now entitled to have that moiety. But upon consideration of the terms of the will, we are disposed to the opinion that ₹ was not left to Bissessur and Kedarnath in shares vesting in them respectively. It was simply assigned for the maintenance of both, under the management of Makhuda Debi; and it was specifically provided that should Bissessur, on growing up, fail to live in the family residence of the testator, he should not have the property. Thus it appears that it was not to vest in him absolutely, and we think that so long as Kedarnath lives the property ₹ must be considered as appropriated to his maintenance. Plaintiffs, therefore, are not entitled to oust him. The result is, that the decree of the lower Court will be varied to this extent, viz., that the plaintiffs will have a declaration that Kedarnath is not the validly adopted son of Nobo Krishna, and that they obtain possession of the property described as ₹ in the will of Nobo Krishna Banerji.

The parties will pay their own costs of both Courts.

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CHUCKER-  
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## [CIVIL APPELLATE JURISDICTION.]

1st. LUTFUL HUQ AND ANOTHER . . (PLAINTIFFS) APPELLANTS;  
 AND  
 of GOPI CHUNDER MOZUMDAR (DEFENDANT) RESPONDENT.

*Co-sharers, Suit for rent by one of several—Rent, Suit by one of several  
 Co-sharers—Fractional share of Landlord, Determination of.*

Where, on the consent of all the co-sharers of an undivided property the tenant has agreed to pay the rent to the different shareholders proportion to their respective shares, he cannot, at his option, cease pay the fractional rent which he has previously paid, or agreed pay, to one or more of his landlords.

*Sheik Guni Muhomed vs. T. D. Moran*, 2 C. L. R., (F.B.), 37 explained.

Where there is an arrangement, by which a tenant has agreed to pay the rent to his landlords in proportion to their respective shares in the lands held by him, if a suit be brought by one of such landlords, claiming rent in respect of his particular share of such lands, and in that suit an issue as to right of the plaintiff to the share claimed is fairly raised and determined, the co-sharers acquiescing in that determination, the tenant cannot be allowed to avoid his liability to pay the rent claimed to the plaintiff, on the ground that he had never before recognised the share as being that alleged.

*Gunga Narain Sircar vs. Sreenath Banerjee*, 6 C. L. R., 26, followed.

**A**PPEAL from a decision passed by the Officiating Judge Noakhally, reversing the decision of the Subordinate Judge of that district.

The facts appear from the judgment of the High Court.

Baboo *Doorga Mohun Dass*, for the Appellants.

Baboo *Rajendro Nath Bose*, and Baboo *Chunder Madhul* for the Respondent.

The judgment of the High Court (1) was delivered by MORRIS, J. :—

In this case the plaintiff, as part owner of a certain sued certain tenants for arrears of rent in respect of

(1) MORRIS and PRINSEP, J. J.

and made his co-sharers parties to the suit. Both the tenant defendants and the co-sharers objected to the extent of the share which the plaintiff claimed.

The point at issue between them was, whether the plaintiff could sue as owner of 13 annas 1 gunda 2 cowries 3 krants share of the 8 annas share as he alleged, or as owner of 9 annas 12 gundas 2 krants share, as the tenant defendants and the co-sharers alleged.

The first Court decided in favour of the plaintiff, and gave him a decree in terms of his plaint.

One defendant, No. 22, who appears to have been recognised by the plaintiff as mortgagee in possession of the share of some of the tenants, alone preferred an appeal. The Judge has reversed the decision of the Moonsiff, and given this defendant a decree in respect of so much of the plaintiff's share as is disputed by him, namely, the difference between 9 annas 12 gundas 2 cowries odd, and 13 annas 1 gunda 2 cowries 3 krants of the 8 annas share.

The ground taken by the Judge is, that this defendant as tenant is not bound to "pay his rent fractionally a single hour longer than he chooses so to do." And he supports this proposition by quoting a passage in the judgment of Mr. Justice AINSLIE, sitting alone in the case of *Anoo Mundul vs. Shaikh Kamalooddeen*, 1 Cal. L. R., 249. He also refers to some remarks of the Chief Justice, in the Full Bench case of *Sheik Guni Mohamed vs. Moran*, 2 Cal. L. R., 370. It appears to us, however, that the remarks in the Full Bench case of *Guni Mohamed* cannot be understood as supporting the view taken by the Judge that a tenant defendant can, at his option, decline to pay to a part owner of property the fractional share of rent which he has previously been paying to him. It seems to us that when, on the consent of all the shareholder landlords, a tenant in an undivided property has agreed to pay to the different sharers the rent of the tenure in proportion to their respective shares, and can be, and has been, sued for the rent of a particular share, it is not open to him, without the consent of the owner of that share, to cease paying in accordance with his contract.

It is only, as the Full Bench puts it, by the consent of all the

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parties, by which the arrangement was originally created, that it can, at any time, be put an end to.

There is, however, another ground on which the Judge allows the appeal of the defendant, namely that given in para. 12, that "plaintiff admits defendant has never yet paid at the rate claimed, but avers he ought to." But, as appears from para. 7 of the same judgment, the claim of the plaintiff to a 13 annas 1 gunda 2 cowries 3 krants share of the rent is founded on a right in himself to a 9 annas 12 gundas 2 cowries share, and to the remaining 4 annas odd share in right of his mother under an assignment of it by her to him. In other words, he sets up the right of his mother to the rent of a 4 annas odd share, which right has now passed to him, and clearly if there has been a separate attornment on the part of the tenants in respect of this 4 annas odd share, he is entitled, upon the assignment, to claim that share, together with his own share, as previously existing. As we understand the judgment of the Courts below, the first Court distinctly held that the share of the plaintiff was, as claimed by him, 13 annas 1 gunda 6 cowries of 8 annas, that is 9 annas odd his own, and 4 annas odd in right of his mother's separate share; and the Judge on appeal does not find otherwise. He simply says that the evidence as to the plaintiff's mother having made over her share to him is "miserably weak." We must, therefore, take it that the plaintiff on the one hand proved the right to his own share and the right of his mother to the share assigned by her to him, while the defendant on the other hand failed to prove the case set up by him that the property was held by the different co-sharers in shares different from those alleged by the plaintiff. The co-sharers, not having appealed against the judgment of the first Court, must be understood to have acquiesced in the decision that the share of the plaintiff in this property is, as he states, 13 annas odd. This being so, the question arises whether it is open to the defendant No. 23, in his position of tenant, to dispute the right of the plaintiff to a 13 annas odd share of the rent, simply on the ground that he has never yet paid to him agreeably to that share. It must be observed that this defendant never resisted the claim of the plaintiff on the ground taken for him by the Judge that he was at liberty to decline pay-

ment of a fractional share of the rent. His objection had reference solely to the extent of the plaintiff's share. This point had been found against him, and the right of the plaintiff to a 4 annas odd share over and above his original 9 annas odd share had been established to the satisfaction of all the co-sharers. It does not, therefore, as it seems to us, lie in the mouth of the tenant-defendant to dispute the right of the plaintiff to obtain rent on account of these two amalgamated shares. We are supported in his view by the decision passed by Mr. Justice JACKSON and Mr. Justice TOTTENHAM on the 15th January 1880, in a case very similar to the present one, viz., *Gunga Narain Sirkar v. Sreenath Banerjee*, 6 C. L. R., 16. Those learned Judges held that the only persons interested in raising the question of shares, namely the co-sharers having acquiesced in the plaintiff's statement, the tenant-defendant runs no risk of being called upon to pay again any part of the share adjudged to the plaintiff. We think that when the issue of the right of the plaintiff to the share claimed by him has been fairly raised and determined, and the co-sharers have acquiesced in that determination, the present defendant cannot be allowed to avoid his liability to pay the rent due upon such share on the ground that he has never before recognized such to be the share of the plaintiff. In this view we set aside the judgment of the lower Court, and restore and affirm that of the first Court, with costs of this Court and of the Court below.

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## [ORIGINAL CIVIL JURISDICTION.]

1880.

IN THE MATTER OF THE PROPERTY AND CREDITS OF  
D. McCORKINDALE, DECEASED.*Solicitor's Lien—Discharge of Attorney—Death of Client—Dissolution of  
firm of Solicitors.*

The death of a client does not discharge his attorney and so cause his lien to arise.

The dissolution, however, of a firm of attorneys discharges the clients for whom they had been acting, and such client or his representatives are entitled to have the papers in the hands of the late firm delivered up.

*In re Moss*, L. R. 2 Eq., 345.

**T**HIS was an application on behalf of the Officiating Administrator-General of Bengal for an order that the firm of Messrs. Harriss & Co. do hand over forthwith to the Officiating Administrator-General of Bengal and the Administrator of the property and credits of the said Donald McCorkindale, deceased, all drafts, deeds, letters, copies, documents, and papers in their hands in reference to all matters and suits wherein the late firm of Messrs. Orr and Harriss were concerned for, and on behalf of the said Donald McCorkindale, to be held by the said Officiating Administrator-General subject to their lien thereon for costs.

This application was supported by the affidavit of Frederick William Jennings, a member of the firm of Messrs. Carruthers and Jennings, who states as follows:—

That for some considerable time, previous to the 3rd of February 1880, the said Alfred Edmund Harriss and William James Simmons, carried on business as attorneys in copartnership with John Cave Orr under the style or firm of Orr and Harriss.

That on the 3rd of February the said firm of Orr and Harriss became dissolved.

That for some time previously to the dissolution of the said firm, the members thereof acted as the attorneys and legal advisers of one Donald McCorkindale, of Seebpore Foundry at Howrah, in the environs of Calcutta, an Engineer.



That the said Donald McCorkindale departed this life on the 23rd of January 1880, having made and executed his will on the 28th of November 1879, whereby he appointed James Anderson and William Palmer executors thereof.

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—

That the said James Anderson and William Palmer renounced probate of the said will, and on the 19th of February 1880 the Officiating Administrator-General of Bengal applied to this Hon'ble Court, in its Testamentary and Intestate Jurisdiction, and obtained Letters of Administration, with a copy of the said will annexed, of the property and credits of the said Donald McCorkindale, deceased.

That the estate of the said Donald McCorkindale is greatly involved, and is in a state of very great complication, there being numerous suits pending, and particularly one which was filed some time in the year 1876, and in which suit the said firm of Messrs. Orr and Harriss acted for the said Donald McCorkindale.

That the whole of the estate of the said Donald McCorkindale is subject to various mortgages, but neither the said Administrator-General or my said firm have any copies of the same, but I am informed and believe that the said firm of Messrs. Harriss & Co. have copies of all such documents in their possession, and also all papers in connection with the estate of the said deceased.

That it is impossible properly to represent the estate of the said deceased without obtaining possession of the cause papers, drafts, and other papers in the hands of Messrs. Harriss & Co.

That the said firm of Messrs. Harriss & Co. claimed the sum of Rs. 11,616-4 as due to the late firm of Messrs. Orr and Harriss for costs in respect of certain work done for the said deceased, Rs. 5,572-6 of which amount is secured by assignment of a decree against the estate of the late Heera Lall Seal.

That no money whatever has as yet come to the hands of the said Administrator-General, as such Administrator, as afore-  
said, and I verily believe that the said estate is nearly insol-

That my said firm has repeatedly applied to the said firm of Messrs.

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Harris & Co., and requested them to hand over all the papers in their hands relating to the affairs of the said deceased, offering to allow them to retain their lien thereon, and hold them on that condition, and they have refused to do so without payment of their costs in full prior to their handing over such papers and documents, as appears from the following letter received by my said firm from the said firm of Messrs. Harris & Co :—

“DEAR SIRs,—As promised we now send you a statement of our late firm’s account.

In September 1878 there was due to them a sum of Rs. 4,849-2-8 upon bills made out, and they had still some heavy work in hand for the deceased, the bills of which were, of course, only in draft. They then required to be placed in funds, but as the deceased was unable to meet their requirements, he assigned to them a decree to cover Rs. 5,572-6 of their claim consisting, as above stated, of Rs. 4,849-2, and of Rs. 723-3-4 to account of such draft bills.

The amount of the decree, when realized, will be deducted from the total balance mentioned in the account, leaving due Rs. 6,044-8 only, upon payment of which we shall be glad to hand you all papers in connexion with the estate.”

That on the 3rd of April my said firm wrote MESSRS. Harris and Co., as follows :—

“DEAR SIRs,—On behalf of the Administrator-General we must again call upon you to hand over the papers of the deceased, as we have already told you we are willing to hold them subject to your lien. Unless we hear from you that you are willing to hand them over to us at once, subject to your lien, we must really apply to the Court, as it is impossible for the Administrator-General to properly represent the estate without the papers.”

That no reply has been received to the above letter up to the time of my swearing this affidavit.

That unless the said papers and documents are made over to my firm, who are now the Solicitors of the said Officiating Administrator-General of Bengal, in the matter of the estate of the said Donald McCorkindale, it will be wholly impossible for the said Officiating Administrator-General to protect the said

state, or conduct or act in the various suits now pending relating to the said estate.

I further say that I am advised, and believe that the dissolution of the firm of Messrs. Orr and Harriss was a discharge by them of the relation formerly existing between them and the said Donald McCorkindale as attorney and client, and that they cannot, as of right, claim to retain the papers and documents belonging to the late Donald McCorkindale until their costs are paid, but are bound to hand the same over to the Officiating Administrator-General of Bengal as representing his estate.

*Branson*, (for the Officiating Administrator-General):—It is contended by Mr. Harriss that the death of Mr. McCorkindale discharged his late firm, and that their lien at once arose. Now, a voluntary discharge raises the lien at once, but the death of a client is not a discharge.

We contend that the act of the attorneys has since operated as a discharge, and they are not entitled to hold these papers against the Administrator-General. By the dissolution of the partnership, Messrs. Orr and Harriss discharged the estate of Mr. McCorkindale. His death did not terminate their employment; that continued until the dissolution. In the case of *In re Lees*, L. R. 2 Eq., 345, it was said:—"If the client discharges the attorney, the Court will not order him to deliver up the papers." Here, however, the discharge was by the attorney's own act. The Administrator-General is therefore entitled to have the papers delivered over to him.

*T. A. Apar*, (for Messrs. Harriss & Co.):—The death of the client amounts to a discharge of the attorney, and his lien then arises. But even supposing that it does not, the lien is not done away with. Section 171 of the Indian Contract Act provides that attorneys of a High Court may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them.

The word "goods" can only, in the case of an attorney, mean his papers and documents in his custody belonging to his

*Wilson, J.*—Is not the executor in the position of the client? Has he not the right to continue the employment or

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not as he chooses? If the attorney is willing to act, and the client discharges him, the lien arises. Here the Administrator-General might have continued the employment.]

The discharge was complete upon the death of the client. The option which the Administrator-General might have of continuing the employment does not get rid of the fact that there was no one at the time of the death of the client who could continue it, nor was there any one who could do so until the Administrator-General obtained letters of administration. No lien was lost by the dissolution of partnership. The Act does not contain any provision for discharging a lien.

[WILSON, J.—Does not the case come under section 1, which says that nothing shall affect any usage or custom?]

In many cases the giving up of goods virtually destroys the lien. The case of *In re Moss*, cited on the other side, is really an authority in my favour. It would have been necessary for the Administrator-General to give the firm a fresh warrant if he had wished them to continue their employment; and that shows that the death of the client operated as a discharge. Even if the client is embarrassed by the attorney's lien, that in no way affects his right.—*In re Faithful*, L. R., 6 Eq., 325. In that case it was held that where a solicitor has been discharged by his client, he will not be ordered to produce or deliver up to the client the papers on which he claims the lien, although his not doing so will embarrass the client in protecting or defending his claims. The case of *Chalie vs. Gwynne*, 9 Beavan, 319, also shews that the attorney's retainer is discharged at the time of the client's death. If there is a contract between the client and attorney which is put an end to by the death of the client, the lien arises as soon as the contract is determined.

The judgment of the Court was as follows :—

WILSON, J. WILSON, J. :—

I do not think there is any reason for doubt in this matter. The facts are simple. Mr. McCorkindale employed the firm of

Mr. Orr and Harriss as his attorneys. On the 23rd of January, he died leaving a will, whereby he appointed Messrs.

Anderson and William Palmer his executors. These men, having renounced probate of the will, the Administrator-General, on the 19th of February last, obtained letters of administration to the property and effects of Mr. McCorkindale. Credited demands were then made by the Administrator-General to the present firm of Messrs. Harriss & Co. to deliver over to him all drafts, deeds, letters, documents and other papers which were then in their hands in reference to all matters in which the late firm of Messrs. Orr and Harriss were concerned on behalf of Mr. McCorkindale, the Administrator-General offering to hold these documents subject to their lien for costs.

Messrs. Harriss & Co refused to deliver the papers without payment of their costs in full.

These are the important facts. The question now is whether the attorneys are entitled to say, "We won't part with the papers until our debt is paid," or whether the Administrator-General is entitled to say, "Give up the papers to my attorney, and he will undertake to hold them subject to your lien for costs."

Apcar says, section 171 of the Contract Act gives the attorney an absolute lien. I do not think so, because section 171

of the Act says:—"Nothing herein contained shall affect the right of lien or custom of trade," nor any incident of any contract, inconsistent with this Act. It seems to me that no part of English law is inconsistent with section 171 of the Contract Act and therefore this case must be governed by the English law. The clear principle on which this case rests is, that where the relation of attorney and client exists, the client may continue to employ the attorney or change him. If he does not, the attorney being willing to act, he cannot ask the client to give up the papers without first satisfying his lien. If the attorney has his option,—he may, if he chooses, go on acting for his client, or if he chooses to cease to act then he must give up the papers.

It is no doubt how this case would have been decided had Mr. McCorkindale been still alive, for it is clear that the attorneys

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*Judgment.*  
—  
WILSON, J.

have, by their own act, put it out of their power to continue to act for him. The only circumstance which distinguishes that from the present case is, that the client has himself died. But does that really alter the case? I think not. In the case reported in L. R., 2 Eq., 345, *In re Moss*, the MASTER of the ROLLS said: "I hold it to be settled by the authorities that if a firm of solicitors becomes bankrupt, the bankruptcy is still a discharge of the clients who employ them, but I also hold this, which I think is equally clear, that if the client becomes bankrupt, and the assignee do not employ the firm of solicitors, that is a discharge by the client of the solicitors;" plainly implying that the assignee would have the same right to continue the employment as the person whom he represented.

It appears to me that after the Administrator-General had taken out letters of administration, he was entitled to the same freedom of action as the client had. He was at liberty to change the attorney or continue employing him. The only thing which prevented that option being exercised in this case was, that the attorneys had, by their own act, put it out of the power of the Administrator-General to employ them. The case is the same as if the original client were alive. I think the order must therefore be made, and made with costs.

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## [CIVIL APPELLATE JURISDICTION.]

ABDUL BARI BY HIS GUARDIAN . (PLAINTIFF) APPELLANT ;  
 AND  
 RASH BEHARI PAL, AND } (DEFENDANTS) RESPONDENTS.  
 ANOTHER . . . . . }

1880  
 May 14th.

No. 1561 of  
 1879

*Mahomedan Law—Suit by uncle as next friend of infant—Guardianship,  
 Mahomedan Law of.*

The rule of Mahomedan Law that an uncle cannot be the guardian of the property of a minor, does not prevent an uncle representing his infant nephew, under the Code of Civil Procedure, as next friend in a suit.

**A**PPEAL from a decision passed by the Subordinate Judge of Hooghly, reversing the decree of the Moonsiff of Howrah.

This was a suit to recover possession of certain property, instituted by one Sheikh Fuzul Huq, “as uncle and guardian of the minor Abdul Bari.”

Sheikh Fuzul Huq and his nephew were Mahomedans, and an issue was raised as to whether, having regard to the Mahomedan law of guardianship, the uncle was competent to bring the suit on behalf of his nephew.

It appeared that the minor plaintiff had no relations, save two uncles, Sheikh Fuzul Huq and Sheikh Aftabuddin. The latter was hostile to his interests and was made a defendant. No certificate under Act XL of 1858 had been taken out by Sheikh Fuzul Huq, but leave to institute the suit was granted him under section 3 of that Act.

The Moonsiff held that the objection taken by the defendant, that the suit was improperly brought, could not be sustained. On the merits, he found that the plaintiff’s case had been established, and gave a decree accordingly.

The Subordinate Judge, however, reversed the decree, not only on the merits but on the ground that the suit was wrongly instituted, inasmuch as under the Mahomedan law an uncle was not competent to be a guardian of a minor’s property.

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 PAL.  
 Judgment.

The plaintiff thereupon appealed to the High Court, on the grounds that the Subordinate Judge was wrong in holding that the suit was improperly constituted; that there had been a mis-trial, inasmuch as he had not given due consideration to facts and circumstances relied upon by the first Court, and that he had failed to take into consideration a rent decree and other evidence of possession by the plaintiff.

Moonshee *Serajul Islam*, for the Appellant.

Baboo *Troilkhyanath Mitter*, for the Respondents.

The judgment of the High Court (1) was as follows :—

This was a suit which may be properly described as a suit of Abdul Bari, a minor, by his uncle and guardian, to recover possession of certain land which had been sold in execution of a decree against Aftabuddin and others, in respect of which a claim had been put in on the part of the plaintiff and rejected.

The defendants objected to the suit in the first instance, on the ground that under the Mahomedan law an uncle could not be the guardian of his minor nephew, and consequently the suit could not be maintained. The question of the plaintiff's title was also raised.

The Moonsiff, admitting that the Mahomedan law discounted the appointment of uncles as guardians of minors, considered that the plaintiff had no other next friend, and that in the circumstances of the case he was not called upon to dismiss the suit upon that ground. Then, as to the title, the plaintiff relied upon a kobala from three persons, Emtazuddin, Aftabuddin and Majedennassa, to the father of the plaintiff, and the defendants alleged that this kobala was fraudulent and collusive. The defendants were fortunate in having the assistance of Aftabuddin, one of the parties to the kobala, who said he had not executed it, and that he had been a minor at the time of its execution, but the Moonsiff considered that the kobala had in truth been executed, that the passing of the consideration had been proved, that *bonâ fide* possession on the part of the vendee had been

(1) JACKSON and TOTTENHAM, J.J.



well made out, and that upon the whole the plaintiff was entitled to a decree.

This judgment was appealed to the Subordinate Judge, and he, it seems to us, in a not very well-considered judgment, has reversed the judgment of the Moonsiff. In the first place he lays it down that the Moonsiff ought to have dismissed the case on the ground that, under the Mahomedan law, an uncle cannot be the guardian of the property of a minor. He quite forgets that under the Code of Civil Procedure all that is necessary is, that the minor should be represented by his next friend, and we are not aware that there is anything in the Mahomedan law which prevents an uncle from representing in Court, as next friend, his minor nephew. The property is of small value, and the Court has full discretion to allow a relative to institute or defend the suit on behalf of the minor without a certificate. It appears to us, therefore, that the appellate Court was quite in error in saying that the suit ought to have been dismissed on any such ground. Then the Subordinate Judge proceeds to deal with the case on the merits, and here he records no doubt positive findings, which the learned pleader for the respondents insists are valid and conclusive findings which this Court is not competent in second appeal to question. I differ from the learned gentleman in that respect, because I think that, when those findings of fact are arrived at by a misapprehension of the evidence, and when these findings are mixed up with so-called presumptions which do not exist, there is certainly a mis-trial of the case upon the evidence which entitles the party injured by it to come up to this Court. The Subordinate Judge says truly enough that the defendant "is a purchaser at a public sale, and the person coming to disturb his right must prove a case superior to his." He might have gone further and said that the plaintiff is an unsuccessful claimant under the Code of Civil Procedure and has to make out his title, and the burden rests upon him. Then he goes on to say: "Even supposing the defendant is to make a *prima facie* case, the relation between the judgment-debtor and the minor's mother, in whose favour the kobala was executed and the circumstances of the case, fully raise a presumption in his (defendant's) favour." We do not find that any such presumption

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PAL.

Judgment.

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 PAL.  
 —  
*Judgment.*  
 —

exists. The alleged sale took place many years ago, and the mere fact of the parties being related to one another does not raise any such presumption. The judgment proceeds: "The kobala is registered by a Cazeer at a time when Government Registry Offices were in existence." Now, the Government Registry Offices were in existence no doubt in 1863, as they had been for many years before that, but registration in those offices was not compulsory. The practice of registration before Mahomedan Cazeers by Mahomedans was in full vigour at this time, and if the judgment means to say that registration in the office of a Cazeer is a suspicious circumstance, then it is erroneous. If it does not mean that, then it means nothing. Then as to the passing of consideration, the Moonsiff said that it had been proved, and it appears that two of the subscribing witnesses to the document did depose to that effect. That the lower Appellate Court disposes of by saying that the writer of the kobala does not prove the passing of consideration. It was not necessary that he should. Then he observes: "The witnesses examined by plaintiff to prove possession made mention of the names of the ryots, but could not, out of their own knowledge, say that the minor's father ever received rent from them, while the witnesses examined by the defendant proved possession of the judgment-debtors by collecting rents from the ryots." Now here is an entire omission of a most material fact, viz., that the witness, Nidhiram, who, we understand, was an occupant ryot on the disputed land, did prove that he had paid rent to the minor's father, and it further appears from the judgment of the Moonsiff that the plaintiff, or his father had obtained rent decrees in respect of the balance thereof. This also is unnoticed by the Subordinate Judge. Then the plaintiff is found fault with for not making all the vendors defendants or witnesses. It is difficult to attach much weight to a criticism so uncertain in its character. Then it is said: "The only vendor who has been made a defendant disproves the plaintiff's allegation of the kobala." That is a statement which is no doubt true to a certain extent, but the Moonsiff deals at length with the evidence of the witness Aftabuddin, and gives excellent reasons for holding that his testimony is false in toto, and as to this matter the Appellate Court is entirely silent.

Having said this, the Subordinate Judge says: "On the whole there is not the slightest reason to support the plaintiff's case." Surely it is most inaccurate to say that there is not the slightest reason to support the plaintiff's case, although it may be that on the whole the evidence on the side of the defendant is better than that on the side of the plaintiff, which in this case is by no means certain. We are of opinion, therefore, that there has been a mis-trial by the lower Appellate Court in this case, and that there must be a remand for a new trial.

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## [CIVIL APPELLATE JURISDICTION.]

MODHU SOODUN CHOWDHRY (DE- }  
FENDANT) . . . . . } APPELLANT ;

Feb. 3rd.

No. 219 of  
1880.

AND

S. COCHRANE (PLAINTIFF) . . . . . RESPONDENT.

*Jurisdiction—Cause of action arising out of jurisdiction—Civil Procedure Code, Act X of 1877, section 17—Permanent Residence—Onus of Proof.*

Where the cause of action arises in the jurisdiction of a Court other than that in which the suit is brought, the plaintiff must, under the provisions of section 17 of Act X of 1877, show that the defendant at the time of the commencement of the suit actually and voluntarily resided or carried on business, or personally worked for gain, within the jurisdiction of the Court in which the suit was brought.

**R**EGULAR APPEAL from a decision passed by the Subordinate Judge of Hooghly, dated the 20th May 1878.

The plaintiff in this case sued, in his own name, in the District Court of Hooghly, to recover Rs. 9,675, being the amount of principal due on a promissory note made by the defendant which was to the following effect:—

Calcutta, the 17th April 1875.

On demand I promise to pay at the Office of the Agra Bank, "Limited," Calcutta, to the Manager of the said Bank, or order, the sum of Rs. 9,675, for value received.

(Sd.) MODHU SOODUN CHOWDHRY.

The defendant alleged that he did not reside within the jurisdiction of the Hooghly Court, but at Calcutta, that he had ceased

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to reside within the jurisdiction since the sale of the family house five or six years before. His mother and brothers, it appeared, lived at Bhundurbatti in the district, and the defendant frequently visited and lived with them, though he generally resided in Calcutta at his son's lodging. The Subordinate Judge was of opinion that the residence in Calcutta was of a temporary character, and that he might equally be taken to be a resident at Bhundurbatti.

He accordingly decreed the plaintiff's claim with costs and interest at 6 per cent. The defendant appealed to the High Court.

*J. D. Bell*, and *Baboo Prannath Pundit*, for Appellant.

*Paul* (Advocate-General), Messrs. *Roberts, Morgan & Co.*, and *Baboo Boikantonath Pal*, for Respondent.

*J. D. Bell*.—The Hooghly Court had no jurisdiction to try this case, as the defendant does not reside within the jurisdiction of the Court. Occasional visits to his brothers at their family residence cannot be held to amount to legal evidence of residence—*Marshal's Report*, 64. It is necessary to notice the slight difference between section 5 of Act VIII of 1859, and section 17 of Act X of 1877. The word "dwelt" is used in the old Act, while in the new Act which governs this case the words are "actually and voluntarily resides,"

On the face of the promissory note, however, the plaintiff, it is evident, cannot, in his personal capacity, succeed in the present suit—see section 230 of Act IX of 1872 (Contract Act) and sections 92 and 93 of Act I of 1872.

*Paul* (Advocate-General).—There is no satisfactory evidence to show that the defendant has parted with his interest in the family residence at Bhundurbatti, and therefore the presumption of his having there a permanent residence is not rebutted.

When a note is made in the name of the manager, the manager personally can sue. See *Byles on Bills*, page 83.

Section 230 of the Contract Act does not apply, for in this contract there is nothing to show that it was made on behalf of the Bank.

The judgment of the High Court (1) was as follows:—

I cannot say that this case is entirely free from doubt, but the question which the Court below had to determine, and which we have to determine, appears to be exceedingly simple. Mr. Cochrane, who is the agent of the Agra Bank, Limited, sued the defendant in the Court of the Subordinate Judge of Hooghly, upon a promissory note made in Calcutta, on the 17th April 1875, which is to this effect:—"On demand I promise to pay at the office of the Agra Bank, "Limited," Calcutta, to the Manager of the said bank, or order, the sum of Rs. 9,675 for value received." Therefore, the plaintiff's cause of action in this case, no doubt, arose in Calcutta. Section 17 of the Code of Civil Procedure declares that, "subject to the limitations aforesaid, all other suits shall be instituted in a Court within the local limits of whose jurisdiction (a) the cause of action arises, or (b) all the defendants at the time of the commencement of the suit, actually and voluntarily reside or carry on business, or personally work for gain." Therefore the cause of action, not having arisen in Hooghly, clearly it seems to me it lay upon the plaintiff to show that the defendant, at the time of the commencement of the suit, actually and voluntarily resided, or carried on business, or personally worked for gain within the jurisdiction of that district Court. Did the plaintiff establish that fact or not? He called three witnesses, and of those three the first, as it seems to me, so far from proving the plaintiff's allegation, seems to go rather in the opposite direction. The second witness says "I know Modhu Soodun, the defendant in this suit. His house is, at Bhundurbatti. I see him occasionally in that village at present. I have seen him in that village within two or three months. I met him in our *para* (quarter). I have heard that his house has been sold. I cannot say where he remains." Then he goes on to say what he had heard as to who purchased the house, and so forth. The third witness says: "I know Modhu Soodun Chowdhry. His house is at Bhundurbatti. My house is about half powa distant from that house. I have not seen him for about six or seven months. Before that I saw him one day in Calcutta;" so that in regard to

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MODHU  
SOODUN  
CHOWDHRY

v.  
COCHRANE.

Judgment.

(1) JACKSON and TOTTENHAM, J.J.

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MODHU  
SOODUN  
CHOWDREY  
v.  
COCHANE.

*Judgment.*

the defendant's actual residence at the time of the commencement of the suit, the nearest approach to proof on the part of the plaintiff, is the statement of the second witness that he had seen the defendant in that village within two or three months. Then we have evidence to the contrary effect given by the defendant himself and his adopted son, and from what they say it seems that the defendant is no longer owner, or part owner of the house at Bhundurbatti; that it had been sold five or six years ago to a person named Prosunno Coomar; that the defendant lives on the earnings of his son in Calcutta; and that the whole of the family lives there. In the evidence of the plaintiff's witnesses there is nothing said as to where the family, wife and children, of the defendant lived. A discussion has taken place, and it appears to me that the Subordinate Judge, whose judgment we have before us, has rather mixed up with the present question an entirely distinct question, that is to say, whether the defendant has truly or ostensibly and colourably sold his share in the family house at Bhundurbatti. The defendant swears that it is a real sale. I do not mean to say that what he says upon that subject is not open to suspicion. It is open to suspicion. He is unable to say what became of the purchase money, and so forth, but I think, even if it be not very clearly made out, that there has been an absolute sale of the property, unless the defendant still permanently resides there, it is not his dwelling place or place of residence at the time of the commencement of the suit within the terms of section 17. The account that he gives is, that he occasionally goes there and puts up sometimes with one brother, and sometimes with another. But then even if we take the strongest case against him, if we think that he did go and reside, occasionally, in his house at Bhundurbatti, but that he habitually and ordinarily for all purposes resides in Calcutta, that, I take it, is to be held his residence, under that section, and not his house at Bhundurbatti in which he might be interested as owner. It appears to me that was the only issue before the Court, and that the Court below has not correctly stated the issue. The lower Court says: "But whether he has a house of his own or not is not the question at issue. It is sufficient for the purpose of this suit, if he resided there, where the

suit was instituted. Of this I think there is ample evidence on the record." We do not think there is ample evidence, and we think this suit was wrongly brought and entertained at Hooghly. But we think at the same time that the conduct of the defendant has been so ambiguous as to have given a fair ground for the commencement of the suit in that district, and that it was very difficult for the plaintiff to say where he really resided. The defendant will, therefore, get no costs. The judgment of the Court below will be reversed, and the plaintiff's suit dismissed.

1880

It is impossible for us to give any positive opinion whether the sale of the house was real or colourable, inasmuch as evidence on that point was not before the Court.

[FULL BENCH.]

ISHUR CHUNDER DUT AND ANOTHER }  
(PLAINTIFFS) . . . . . } APPELLANTS;

June 1st.  
No. 873 of  
1879.

AND

RAM KRISTO DUT (DEFENDANT) . . . RESPONDENT.

*Rent, Apportionment of by purchaser from one of several joint owners—Co-sharers, Effect of sale by one of several—Procedure—Parties—Severance of tenure.*

A sale of a share of a tenure which has been let to a tenant in its entirety does not of itself effect a severance of the tenure or an apportionment of the rent, and in the absence of any such severance or apportionment, the tenant is justified in paying the entire rent as before to all the parties jointly entitled to it.

If the purchaser, whether the sale be a private one or in execution of a decree desires to effect a severance of the tenure and an apportionment of the rent, he must give the tenant due notice; and, if an amicable apportionment of the rent cannot be made by arrangement between all the parties concerned, he may bring a suit against the tenant for the purpose of having the rent apportioned, making all the other co-sharers parties to the suit.

*Sreenath Chunder Chowdhry vs. Mohesh Chunder Banerjee*, 1 C. L. R., 453 considered and approved.

THIS was an appeal, under section 15 of the Letters Patent, from a decision passed in Second Appeal No. 873 of 1879 by Justice MORRIS.

1880  
 ISHUR CHUN-  
 DER DUT  
 v.  
 RAM KRISTO  
 DUT  
 —  
 Statement.

The case having been heard by Sir RICHARD GARTH, C.J., and Mr. Justice MITTER, was by them referred to a Full Bench on the 12th February 1880.

The facts of the case appear from the Reference, the terms of which were as follows :—

“This is an appeal against the decision of a learned Judge of this Court which followed the ruling of a Division Bench in Special Appeal No. 1617 of 1878, involving the same point; and, as we entertain serious doubt as to the correctness of that ruling, and as there are apparently inconsistent decisions in this Court upon the point, we think it right to refer the question to a Full Bench.

“The admitted facts appear to be these :—

“The defendant is the tenant of a certain tenure, which originally belonged to Ram Gopal Nundy and Heera Kristo Nundy, in equal shares.

“Ram Gopal Nundy’s eight annas share then came by inheritance to one Kamola Kant; and Kamola Kant sold a four annas share out of the eight annas to the plaintiff’s uncle, from whom the plaintiff acquired it as his uncle’s heir.

“The defendant has paid rent to Kamola Kant for his four annas share, but has never paid any rent to the plaintiff in respect of his four annas, and he denies the plaintiff’s right to sue for such rent, insisting that he has hitherto paid rent for four annas of the entire tenure to Kamola Kant, and for the remaining twelve annas to Rhidoy and others who claim under Heera Kristo Nundy.

“In this state of facts it has been decided as a matter of law by a Division Bench of this Court, that although Kamola Kant was entitled to an eight annas share of the tenure, and conveyed four annas of that share to the plaintiff’s uncle, and although the plaintiff is undoubtedly entitled to that four annas as his uncle’s heir, he has no right to sue the defendant for the rent of it, until some engagement has been entered into between him and the defendant, creating the relation of landlord and tenant, and rendering the defendant liable to pay the rent of the four annas share to the plaintiff.

“It was decided in the Full Bench case of *Guni Mahomed vs.*



*Moran*, 2 Cal. L. R. (F. B.) 370 (I. L. R., 4 Cal., 96) that one shareholder of an entire tenure cannot bring a suit to enhance the rent of his separate share, or for a kabuleut, merely upon the ground that, by arrangement with the other shareholder, his rent has been paid separately.

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ISHUR CHUN-  
DER DUT  
v.  
RAM KRISHN  
DUT.  
Argument.

"But here the plaintiff derives title to a four annas share of the tenure by a legal conveyance, and the questions which we desire to refer to a Full Bench are—

"1st.—Whether under such circumstances the tenure is not severed in the same way as it would be under a partition made by the Collector; and

"2nd.—Whether the plaintiff, assuming the rents claimed not to have been paid by the defendant to any of the other shareholders, is entitled to recover in this suit the proportionate rent of the share conveyed, although there has been no engagement or consent by the defendant to treat the plaintiff as his landlord.

"(See *Indromonee Burmonee vs. Sureep Chunder Paul*, 15 W. R., 395; *Surut Sundari Dabia vs. Anund Mohun Ghattuck*, 4 Cal. Rep., 450; *Baney Madhub Ghose vs. Thakoor Dass Mundul*, 6 W. R., Act X, Rulings p. 74, per PEACOCK, C.J.)"

The plaintiff did not make the other sharers in the tenure parties to his suit.

Baboo Jogesh Chunder Roy, for the Appellant.

Baboo Kashi Kant Sen, and Baboo Grish Chunder Chowdhry for the Respondent.

Baboo Jogesh Chunder Roy.—It is admitted that the plaintiff's vendor originally held an 8 annas share in the property, and that having sold 4 annas out of the 8 annas share to the plaintiff, continued to draw the rent for the 4 annas retained by him.

My contention is, that the plaintiff, who has been unable to recover the rent due upon the share purchased by him, is entitled to sue the tenant, and it is submitted that this contention is supported by the cases of *Doorga Churn Surmah vs. Jampa*, 21 W. R., 46 (S.C.), 12 B. L. R., 289; and *Tara Chunder Banerjee vs. Ameer Mundul*, 22 W. R., 394.

[PONTIFEX, J.—The question here did not arise in these cases.

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 ISHUR CHUN-  
 DER DUT  
 v.  
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 DUT.  
 —  
*Argument.*  
 —

These cases show that if one of two persons, who are jointly entitled to rent, has been paid his share, the other is entitled to sue for the balance.]

Then, what has taken place here would have the effect of partition made by joint landlords, and each would be entitled after such partition, to sue for his own share.

[GARTH, C.J.—Suppose three joint zemindars make a private partition, no arrangement being made with the tenants as to the payment of rent, and each assigns his share, could the assignees sue for the rent in separate shares?]

Yes; any one of them might sue if the others were made parties to the suit—*Sreenath Chunder Chowdhry vs. Mohesh Chunder Bundopadhyaya*, 1 C. L. R., 453; *Sheik Guni Mahomed vs. T. D. Moran*, 2 C. L. R., 370; *Surat Sundari Dabie vs. Anund Mohun Ghuttuck*, 4 C. L. R., 448, 453. In the present case, the property had been broken up, and the 4 annas share actually conveyed to the plaintiff's predecessor in title, and therefore the suit should lie—*Anodo Churn Roy vs. Kally Coomar Roy*, 2 C. L. R., 464 (S.C.) I. L. R., 4 Cal., 89.

There is an unreported case, Special Appeal No. 534 of 1878, by which it seems to be settled that where there has been a butwara by metes and bounds, each person entitled under the butwara has a right to sue for his share of the rent.

[MORRIS, J.—In such a case the Collector would apportion the rent.]

It is unnecessary that there should be any engagement with the tenants, in order that the assignee of one of several landlords might be entitled to sue for the rent of the share of the rent sued—*Gooroo Prosunno Banerjee vs. Sreegopal Pal Chowdhry*, 20 W. R., 99.

Baboo Kashi Kant Sen.—In the case of *Anoda Churn Roy vs. Kaly Cumar Roy*, 2 Cal. L. R., 464, (S.C.) I. L. R., 4 Cal., 89, the Court held that as there had been no actual division, but that the property remained *ijmal*, a suit by one co-sharer would not lie. Here the property has not been divided, and the suit ought on the authority of that case to be dismissed.

[GARTH, C.J.—But in the present case there has been an actual conveyance of a 4 annas share to a stranger.]

But it has been held the purchasers of a zemindar's right, even where they have their share separately recorded in the Collector's office, do not acquire any right to alter the position of tenants, as regards the manner in which the rent is to be paid—*Delauney v. Koflooddeen*, 25 W. R., 35.

[GARTH, C. J.—As far as the authorities go, it would seem that severance by act of law entitles a partner to separate collection of rent, whereas a severance by the act of the parties has not that effect.]

The suit is bad for want of parties—*Kalee Churn Singh vs. Solano*, 24 W. R., 267; *Bhyrub Mundul vs. Gojaram Banerjee*, 17 W. R., 408; see *Salehoonissa Khatoon vs. Mohesh Chunder Roy*, 17 W. R., 452; and *Shaikh Kamalooddeen vs. Anoo Mundul*, 1 C. L. R., 564.

Baboo *Jogesh Chunder Roy*, in reply, contended that as the objection as to parties had not been taken in the Court below, it could not be taken now.

The judgment of the Full Bench (1) was as follows:—

It appears to us that having regard to the weight of authority in this Court, as well as to the question of principle and convenience, the proper solution of the points referred to us is as follows:—That a sale of a share in a tenure, which has been let to a tenant in its entirety, does not of itself necessarily effect a severance of the tenure, or an apportionment of the rent, but that if the purchaser of the share desires to have such a severance or apportionment, he is entitled to enforce it by taking proper steps for that purpose.

If he takes no such steps, then the tenant is justified in paying the entire rent, as before, to all the parties jointly entitled to it. But if the purchaser desires to effect a severance of the tenure and an apportionment of the rent, he must give the tenant due notice to that effect, and then, if an amicable apportionment of the rent cannot be made by arrangement between all the parties concerned, the purchaser may bring a suit against the tenant for the purpose of having the rent apportioned, making all the other sharers parties to the suit.

No real injustice will be done to the tenant under such cir-

(1) GARTH, C. J., JACKSON, PONTIFEX, MORRIS, and MITTAR, J. J.

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ISSUE CHUN-  
DER DUT  
v.  
RAM KRISTO  
DUT.  
Judgment.

1880

ISSUE CHUT-  
DER DUT  
v.  
RAM KRISTO  
DUA

—  
Judgment.  
—

cumstances, because the possibility of the severance of the tenure by butwara, sale, or otherwise, is only one of those necessary incidents of the property, which every tenant is, or must be presumed to have been aware of, when he took his lease; and as regards the costs of any suit which may be brought for the purpose of having the rent apportioned, they would of course be a matter for the discretion of the Court, and would probably depend upon how far in each case the tenant has had a fair opportunity of amicably adjusting the apportionment.

An instance of a suit of this nature will be found in the case of *Sreenath Chunder Chowdhry vs. Mohesh Chunder Banerjee*, 1 Cal. Law Reports, 453, decided by JACKSON and CUNNINGHAM J.J., where seven mouzahs had been let in putni to certain tenants by the zemindar, and then under a decree against the zemindar, three of those mouzahs were sold to A, and the other four to B.

A then brought a suit against the putnidars to have his share of the putni rent apportioned, making B, the purchaser of the other mouzahs, a party to the suit, and it was held that the suit was properly brought.

It appears to us that this case was rightly decided, and that it is impossible, upon principle, to distinguish cases where a tenure is sold *privately* from those where it is sold by *public auction*, or, on the other hand, to distinguish cases where a tenure is severed by different portions of its area being sold to different persons, from those where it is sold to different persons in undivided shares.

In all cases of this kind the entirety of the joint interest should be considered as severable at the option of the purchaser, and it would lead to most inconvenient results, and to the depreciation of property thus sold in different lots, if the purchasers of such lots were compelled to collect their rents in one entire sum, conjointly with one another, or with the owners of the unsold shares or portions.

In this particular case, as the plaintiff did not take any proper steps to make arrangements with the tenant or to obtain an apportionment of the rent, the learned Judge of this Court was right in dismissing the suit; and this appeal must consequently be dismissed with costs, including those of the hearing before the Full Bench.

## [CRIMINAL JURISDICTION.]

IN THE MATTER OF DWARKA MANJHEE } PETITIONERS.  
AND OTHERS . . . . . }

1880  
June 9th.

No. 98 of  
1880.

*Conviction for graver offence on appeal—Criminal Procedure Code (Act X of 1872) section 448—Appeal, Right to withdraw petition of.*

It is not competent to an Appellate Court to find a prisoner on appeal guilty of a graver offence than that with which he was charged at his trial, unless an opportunity is afforded to the accused of defending himself against the charge so altered.

In the matter of *Chunder Nath Deb*, 5 C. L. R., 372, distinguished.

*Quare.*—Whether a petition of appeal against a conviction can be withdrawn after the Appellate Court has perused the evidence.

THIS was motion to set aside a conviction and sentence passed by the Sessions Judge of Mymensingh, on the ground that he had no jurisdiction to pass such sentence by reason of the prisoners having by petition withdrawn the appeal which they had presented against the decision of the Deputy Magistrate.

The circumstances are stated in the judgment of the High Court.

*Phillips*, and Baboo *Mohiny Mohun Roy*, for Petitioner.

The judgment of the High Court (1) was as follows :—

The petitioners before us were convicted before the Deputy Magistrate of Mymensingh of the offence of being members of an unlawful assembly, under section 143 of the Indian Penal Code, and were sentenced to six weeks' rigorous imprisonment and a fine of Rs. 20 each, or, in default, to further imprisonment for two weeks each. They appealed to the Sessions Judge. On the day that the appeal was disposed of, their Vakeel stated that they wished to withdraw the appeal. The Sessions Judge refused this in his judgment, and says that on this being

(1) TOTTENHAM and MACLEAN, J.J.

1880  
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 In re  
 DWARKA  
 MANJHEE.  
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 Judgment.

intimated, he said that in that case they must put in a petition to that effect, but that the Court would not thereby feel itself debarred, should it think the sentence passed to be inadequate, from making such enhancement as it might deem necessary; and further on, in making the final order, the Court remarks that the prisoners that day put in a petition for withdrawing the appeal. The Judge, however, considered the Deputy Magistrate to have taken an inadequate view of the case; and considered that the prisoners ought to have been convicted under section 147, instead of section 143. He, therefore, altered the conviction accordingly, and passed a sentence of rigorous imprisonment for two years.

They here contend through their Counsel that the Judge had no jurisdiction to deal with the appeal, it having been withdrawn; and it has been further contended that even if the appeal be taken as not withdrawn, the Court, not having allowed its withdrawal, the Judge had no authority to alter the conviction to one of an offence of a graver nature than that with which the prisoner had been charged in the first Court, and that under any circumstance the sentence passed in appeal was too severe.

We are not prepared to say in this case that the petition for withdrawing the appeal, presented as it was at the last moment, debarred the Appellate Court, which had perused or had heard the evidence read, from dealing with the appeal on the merits. There is authority—*Chunder Nath Deb, In the matter of*, 5 C. L. R., 372—for holding that an appeal can be withdrawn at the option of the appellant before the Appellate Court has decided to hear it, but that case does not go so far as the petitioners contend for in the present case. But we think that the Appellate Court was not right in altering the conviction of the petitioner so as to find them guilty of a graver offence than that with which they had been charged on their trial. It is provided in the Code of Criminal Procedure that the Court may alter the main charge, but where that is done, the accused must be allowed an opportunity of defending against the charge so altered. We are inclined to think with the Sessions Judge that the sentence originally passed by the Deputy Magistrate was inadequate, but we find that since the order passed in

appeal the prisoners have undergone upwards of three months' imprisonment in addition to the term first imposed upon them. They have now in fact been imprisoned for four months and a half, being a period not very far short of the maximum provided in the offence with which they were charged, and we think they have undergone a sufficient punishment. We, therefore, now direct their release.

1880

## [CIVIL APPELLATE JURISDICTION.]

AM COOMAR MITTER (PLAINTIFF) . . . APPELLANT;

May 27th.

AND

No. 1887 of  
1879.

BHCHAMOYI DAS AND OTHERS (DEFENDANTS) RESPONDENTS.

*Hindu Law—Money advanced for proper purposes to Hindu Widow, whether a charge on husband's estate—Marriage of husband's granddaughter.*

Money advanced to the widow of a deceased Hindu for the purposes of the marriage ceremony of the daughter of her deceased husband's son, may, on the death of the widow, be recovered from the estate of the husband in the hands of his heirs.

**A**PPEAL from a decision passed by the Subordinate Judge of Hooghly, affirming the decree of the Second Moonsiff of Howrah.

The plaintiff in this case sued to recover the sum of Rs. 750, alleged to have been advanced to his daughter Bhobo Sundari and her late mother-in-law Bindo Bashinee Dassi, on the occasion of the marriage of the two daughters of the former lady, and it was sought to make the estate of Bindo Bashinee, which she held as the widow of her deceased husband, liable for the debt. The defendants to the suit were the representatives of Bindo Bashinee, and Bhobo Sundari. The latter admitted the claim, but the other objected that, even if Bindo Bashinee had incurred the debt, it was a personal liability and could not be realized from the estate of Bindo Bashinee's husband, in which she had only the limited estate of a Hindu widow.

Both the lower Courts were of opinion that the objection was bad, and that the plaintiff was entitled only to a decree against Bhobo Sundari.

The plaintiff then appealed to the High Court.

1880 Baboo *Guru Dass Banerjee*, Baboo *Golap Chunder Sirkar*, Baboo  
 RAM COOMAR *Sharoda Churn Mitter*, Baboo *Grish Chunder Dey* and Baboo  
 MITTER *Jogesh Chunder Dey*, for the Appellant.  
 v.  
 ICHCHAMOIYI Baboo *Prannath Pundit*, for the Respondent.  
 DASI.

Judgment.

The judgment of the High Court (1) was as follows :—

We are unable to concur in the judgment of the Court below, although, of course, in dissenting from two Hindu gentlemen on such a point, we feel considerable diffidence. But it appears to us that the plain rules of Hindu law, as well as those of equity and good conscience, are in favour of the plaintiff in this case. If the widow to whom this money was advanced by the plaintiff had, in order to pay it off, either alienated or pledged a portion of the estate, we should have had no difficulty at all, because that would have been an alienation or a pledge for a purpose which is distinctly laudable, and recognized as such by authorities on Hindu law—laudable, I say, and proper, because, the purpose for which the money was borrowed was to promote the marriage of the son's daughter of Bindo Bashinee's deceased husband. Now it appears to us—and we think it admits of no doubt—that the male issue of such a marriage, supposing a male to result, would be capable of producing spiritual religious benefit to the deceased husband of Bindo Bashinee, being the son of his son's daughter. Then it appears that no alienation took place, and the suit is not to recover a property alienated for such purpose. The matter proceeded no further than the incurring of a debt, and the present suit is to recover that debt. The question is, whether the debt is such as either to amount to a charge upon the estate, or, more simply, such as the defendants, now in possession of the estate of Bindo Bashinee's deceased husband, are liable to pay. It appears to us that there is nothing in the circumstances which constitutes it a charge, properly so called, upon the estate, but we have no doubt that the defendants are liable to pay that debt. There is a case cited in Morley's Digest, page 285, No. 39, taken from Borrodaile's Reports, 201—*Umrootram Byragee vs. Narayundai*

(1) JACKSON and TOTTENHAM, J.J.



*Ruseekdas* which shows that in a case much resembling his apparently the heirs of a deceased Hindu were obliged to pay, and the estate was held liable to satisfy a debt incurred by that deceased Hindu's widow for a proper purpose. That appears to us to be a just and equitable decision, and we think we are entitled to follow it. It appears that if these daughters had not been married before they attained the age of puberty, spiritual consequences of a most serious kind might be expected, according to Hindu doctrines, to arise both to their deceased father and deceased grandfather, and therefore the widow must be held to have been right in doing what she did to avert such consequences. We think the judgments of the lower Courts must be set aside, and as the other points raised have not been determined, the case must go back to the Court of first instance for trial. The costs of this appeal will follow the result.

1880

## [CRIMINAL JURISDICTION.]

EMPRESS . . . . .

AND

BEHARI LALL BOSE . . . . .

June 9th.

No. 80 of  
1880.

*Cross-examination by Court—Criminal Procedure Code (Act X of 1872)  
section 250.*

It is improper for the Court to cross-examine a prisoner with the apparent object of convicting him out of his own mouth of false statements, and so making him prejudice himself in respect of the matter with which he is charged.

**C**RIMINAL REFERENCE submitted to the High Court by the Sessions Judge of Hooghly under section 263 of the Criminal Procedure Code, Act X of 1872.

The circumstances were as follows :—

The accused in this case, Behari Lall Bose, held a post of Excise Darogah at the Bastarrah Government Distillery in the District of Hooghly.

The rule there observed is, that private distillers may use the government stills for the manufacture of liquor. No restriction is imposed upon the quantity made, but all liquor once ready is put in a godown on the premises, and can only be removed therefrom by the maker after proof and the payment of duty.

1880  
EMPRESS  
v.  
BEHARI LALL  
BOSE.  
Statement.

The accused in this case was in charge of, and responsible for, the due performance of his office.

On the 21st of February last one Sookmoye Saha applied, as alleged by the prosecution, to the accused for three gallons of liquor; this quantity was duly supplied to him by the accused Darogah, but in making out the pass and its counterfoil, the accused had stated the amount taken out to be only two gallons. Sookmoye, with his earthen pot containing the liquor, was arrested by the police on the information of the witness Faizulla, about a quarter of a mile from the distillery. It was admitted that the earthen pot was found to contain three gallons, and that the counterfoil in the possession of Sookmoye only showed a pass of two gallons. Sookmoye was thereupon tried summarily on a charge of illegally removing spirits under section 58 of the Bengal Act VII of 1878.

His defence on that occasion was, that he only applied for and received two gallons of liquor from the Government Distillery, and accounted for the presence of the other gallon in his pot by the story that he purchased the same from one Koonjo Behari Saha, a liquor vendor, whose shop is close to the Government distillery—this purchase having been made during the time which elapsed between his leaving the distillery and the moment of his arrest. In proof of this statement Sookmoye examined Koonjo Behari Saha, and put in the khatta book of the latter in proof of such sale. The Court, however, disbelieved this evidence, finding that the page of the khatta book which purported to show this sale, had been obviously tampered with. It thereupon convicted Sookmoye, and sentenced him to a fine of Rs. 100. At the same time the Court directed that the present accused should be prosecuted. After inquiry by the Deputy Magistrate, the case of the present accused was committed, and duly came on for trial before the Sessions Judge at Hooghly. The charge was drawn under section 218 of the Indian Penal Code. The defence made by the accused was, that he had not, on the date abovementioned, given Sookmoye Saha more than two gallons of liquor as mentioned in the pass; that he was ignorant of the manner in which Sookmoye had become possessed of the extra gallon; that the evidence of the two witnesses, Faizulla and

nachurn, connecting him with the delivery of this extra gallon false, and prompted by feelings of enmity. The jury unanimously acquitted the accused; the learned Judge, however, dissenting from this verdict, referred the case under section 263 of his Criminal Procedure Code to the High Court.

*city* (with him Baboo *Troylucko Nauth Mitter*) for the record:—The facts, as made out by the prosecution, even if true, do not disclose an offence which falls under section 218 of the Indian Penal Code.

It is evident, at any rate, that the jury believed the story of the defence, and gave expression of such opinion by their unanimous verdict. The accused in this case has been put to a severe and lengthy cross-examination by the Court. In the course of this cross-examination an attempt seems to have been made to force the accused to associate himself with the defence set up by Sookmoye in the previous case, and which had been found to have been untruthful by the Court which had tried that case.

The whole of this cross-examination was illegal and quite outside the scope of the powers given to the Judge under section 263 of the Code of Criminal Procedure. See *ex-parte Virabudra d*, 1 Madras High Court Reports, 190; see also *In re Shibash Ghose*, 1 Calcutta Reports, 436, where a similar criticism of this very Judge is strongly remarked upon by the High Court.

The Court ought not to interfere with the unanimous verdict of the jury unless such verdict prove to be palpably and perversely wrong, and although section 263 does leave the discretion of the Judge uncontrolled, yet the High Court will not, unless for imperative reasons, interfere. See a recent case on this subject.—*Empress v. Mukhun Kumar*, 1 Calcutta Reports, p. 275, where the Chief Justice lays particular stress upon the weight attached to an unanimous verdict of a jury.—(See also *Wess v. Mahuddi* ante p. 349. Ed.)

In this case the jury are unanimous, and there is nothing on the record to show that the minds of the jury had been influenced by prejudice, or by any circumstance which may be said to have prevented them from forming a correct judgment.

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EMPRESS  
v.  
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BOSE.  
Statement.

1880  
 EMPRESS  
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 BEHARI LALL  
 BOSE,  
 TOTTENHAM, J. :—

*Judgment.*

TOTTEN-  
 HAM, J.

The judgment of the Court (1), which was as follows, was delivered by

The prisoner in this case was tried by the Sessions Judge of Hooghly, charged under section 218 of the Penal Code, that is that he, being a public servant, framed an incorrect record with intent to cause loss or injury to the public. The facts under which he was charged are as follows :—He is an Excise Darogah in charge of a Sudder Distillery in the Hooghly district. It was his duty to superintend the sale of distilled spirit to retail vendors. He had to record the quantity sold to any particular purchaser, and the amount of duty paid, and he had to give a pass for that quantity to the purchaser. It is alleged that on the 21st February a person named Sookmoye Shama came to the distillery, and obtained a pass from the prisoner for two gallons of country spirit, but that, with the prisoner's connivance, he carried off three gallons, the third gallon not being entered in the book or pass. The purchaser having gone a little way from the distillery, he was stopped, and the excess liquor was discovered. The prisoner was, therefore, charged under the section abovenamed for having incorrectly drawn up a pass describing the quantity of liquor taken by Sookmoye. It is suggested that the accused incorrectly framed the pass in order to cause injury to the public revenue. The charge, however, simply says "injury to the public."

The case was tried by a jury, and the jury unanimously returned a verdict of acquittal. The Sessions Judge, dissenting from that verdict, has referred the case to this Court under section 263 of the Code of Criminal Procedure. Mr. Reilly for the prisoner has contended that the section of the Procedure Code, under which the prisoner has been charged, cannot apply to this case, and he has also contended that by the universal practice of this Court in dealing with cases referred under section 263, it is settled that the verdict of a jury, if unanimous, should be sustained unless it is shown to be obviously wrong. We may observe that the Government has not thought it necessary

(1) TOTTENHAM and MACLEAN, J.J.

cause any appearance to be made in support of the Sessions Judge's opinion. Mr. Reily has read to us the whole record. The evidence for the prosecution, so far as it affects the prisoner, consists of the depositions of two chuprasees attached to the distillery, and the examination of the prisoner himself before the Sessions Court. As to this last, the learned counsel has taken strong objection to the manner of that examination, and we think that he is justified in so taking objection. It seems to us that the Sessions Judge went far beyond what the law contemplates in permitting the Court to examine the prisoner. It is not merely an examination as to points proved in evidence apparently telling against the prisoner, and which he might be able to explain. It is in reality a very severe cross-examination which goes into points entirely outside the matter in question, and which tends to involve the prisoner in a line of defence which he did not himself set up, and which was found to be false by another Court, when set up by the liquor vendor, who was prosecuted under the Excise Act for being in possession of liquor uncovered by a pass. This sort of examination, we think, is not fair to an accused person. It is not proper for the Court to cross-examine a prisoner with the apparent object of convicting him, out of his own mouth, of false statements, and so making him prejudice himself in respect of the matter with which he is charged. As to the witnesses for the prosecution directly implicating the prisoner, we may observe that they are also officers of Government, whose duty it was equally with the accused to see that no liquor was permitted to be taken out of the distillery except under a proper pass. According to their own account they suspected and even saw that something wrong had been done between the distiller and the purchaser. Instead, however, of intimating their suspicions to the Darogah, whose subordinates they were, they allowed things to go on, and the liquor to be taken out of the remises, and then contrived to have it seized probably with the object of obtaining the Government reward, which it appears from the record was actually paid to them. Their own conduct, therefore, was not above suspicion, and it would be very difficult to say that the jury (who unanimously disbelieved them) were obviously or perversely wrong in so disbelieving them. Besides

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—  
BENARI LAYL  
—  
BOSE  
—  
Judgment.  
—  
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HAM, J.

this, the accused brought some evidence to show that the two chaprasses in question were on bad terms with him, owing to his having found fault with them in respect of their official conduct. This point again is one on which the jury had a perfect right to form their own opinion. Then, as remarked by the Sessions Judge in his letter of reference, he did not ascertain from the jury upon what particular ground they came to their verdict of acquittal—whether they absolutely disbelieved the evidence of the chaprasses so far as it inculpated the prisoner, or whether the evidence for the defence was, in their opinion, sufficient to refute that evidence. We do not think it necessary to say anything further than that the jury having come to a clear and unanimous finding of acquittal and there being palpable grounds on which such a verdict was justifiable, we do not feel that we ought to interfere even if our opinion were opposed to that verdict. As to the legal question raised by the learned counsel, as to whether the section applies, it seems unnecessary, in the view we have taken of the case and of our functions, to decide that question. Had there been a conviction, and an appeal from it, it might have been necessary to decide the question of law, but it is more satisfactory to us, and no doubt it is more satisfactory to the prisoner, that the verdict of the jury can be sustained on other grounds. The prisoner must, therefore, be acquitted and released from his bail.

## [CIVIL APPELLATE JURISDICTION.]

SHUMBHU NATH SHAHA CHOWDHRY }  
 (DECREE-HOLDER) . . . . . } APPELLANT;

AND

GURU CHURN LAHIRY (JUDGMENT-DEBTOR) RESPONDENT.

1880  
 April 29th.  
 No. 129 of  
 1879.

*Limitation Act (XV of 1877)—Limitation, Principle of Law of.*

The provisions of the Limitation Act cannot be applied to any proceeding which at the time of its becoming law, was barred by the law of limitation which was then in force unless it can be shown that such was the express intention of the Legislature.

**APPEAL** against an order passed by the Additional Judge of Rajshahye, affirming an order of the Subordinate Judge of that District.

The facts are sufficiently set forth for the purpose of this report in the judgment of the High Court.

*Baboo Raskbeharee Ghose*, for the Appellant.

*Baboo Ishur Chunder Chuckerbutty*, for the Respondent.

The judgment of the High Court (1) was as follows :—

In this case application to execute a decree was made on 25th February 1878. The lower Court has rejected it on the ground that although the next preceding application for execution was made on the 31st July 1876, yet, under Act IX of 1871, Schedule II, Art. 167, which was then in force, execution was on that day barred owing to the application immediately before it having been made on the 27th March 1873, or more than three years previous. The decree, which is sought to be executed, was undoubtedly dead on the 31st July 1876, and no proceedings taken on the application of that date to execute it could revive it. The application could have been opposed on the ground of limitation, and consequently no process of execution could have lawfully issued under it. This principle is clearly laid down in

(1) MORRIS and PRINSEP, J.J.

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—  
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—

the case of *Bisseshur Mullick vs. Maharajah Mahatab Chand Bahadoor*, 10 W. R., (F. B.) 8, and in subsequent rulings of this Court. But the objection now taken in appeal is, that under section 2 of Act XV of 1877, execution can be allowed on the application of February 25th, 1878.

It is contended that, as section 2 of the Limitation Act (XV of 1877) declares that nothing in that Act shall be deemed to affect any title acquired, or to revive any right to sue barred under Act IX of 1871, applications, to execute decrees which do not come within those terms, and which, under Act IX of 1871, are incapable of execution, become revived, the more so, as by section 3 of Act XV of 1877, in the definition of the term "suit" an application is expressly distinguished from a suit.

It appears to us that it was not the intention of the Legislature, by the enactment of Act XV of 1877, to revive decrees which were dead under previous laws of limitation.

That this is so, may be gathered from section 230 of the contemporaneous Civil Procedure Act X of 1877, which limits and cuts down the period for executing decrees then capable of execution.

In our opinion Act XV of 1877 cannot be applied to anything which at the time of its becoming law was barred by the law of limitation which it replaced, unless it can be shown that such was the express intention of the Legislature. Such an inference would be opposed to the principles of a law of limitation.

We may observe also that there is no valid proceeding in the nature of an application "to take some step in aid of execution of the decree," within three years of which the application of the 25th February 1878 was made; consequently the decree-holder cannot take advantage of the alteration in the law regulating the mode of calculation of the period of limitation.

We do not consider the application of the 31st July 1876 to be a valid application so as to give the decree-holder a fresh starting point.

We therefore dismiss the appeal with costs.

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## [FULL BENCH.]

GUJJU LAL (DEFENDANT) . . . . . APPELLANT;

AND

FUTEH LAL (PLAINTIFF) . . . . . RESPONDENT.

1880  
June 1st.No. 2307 of  
1878.*Evidence Act (I of 1872), sections 3, 11, 13, 40, 41, 42, 43—Judgments and decrees in former suits—"Transaction"—"Fact."*

Where the question at issue was whether the plaintiff was entitled to succeed as heir to B, and the issue was dependent upon whether or not S. survived M, the plaintiff relied upon a judgment in a former suit between the defendant and a third party, in which the question, whether S survived M, was decided in the affirmative, *Held* by the Full Bench (MITTER, J., *dissentiente*), that the judgment in the former suit was neither a fact within the meaning of section 11 nor a transaction within the meaning of section 13 of the Evidence Act, and that it was inadmissible in evidence in the present suit.

**A**PPEAL from a decision passed by the District Judge of Gya, affirming the decree of the Subordinate Judge of that District.

This case was referred to a Full Bench by GARTH, C. J., and MITTER, J., with the following opinion:—

"This Special Appeal depends upon a question of law, which we think should be referred to a Full Bench.

It was admitted on both sides in the lower Courts, that if Sham Behari Lal survived Mussummat Sheo Bucham Koer, then the plaintiff was the nearest heir of Bhijhuk Lal, and as such was entitled to succeed; but if on the other hand the Mussummat survived him, then he was not so entitled.

In the Court of first instance the plaintiff relied upon a judgment in a former suit, dated the 6th of June 1876, in which the question was raised between Gujju Lal, the present defendant, who was the plaintiff in that suit, and Jankee Singh and others (the defendants in that suit), whether Gujju Lal or Sham Behari Lal was the nearest heir of Bhijhuk Lal.

It was decided in that suit that Sham Behari Lal was the nearest heir of Bhijhuk Lal.

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GUJRU LAL  
 v.  
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Argument.

In this suit it was contended by the defendant in both the lower Courts, that the judgment in the former suit could not be used as evidence in this suit, because the present plaintiff was no party to the former proceedings; while the plaintiff, on the other hand, contended that the former judgment was admissible in evidence under section 13 of the Evidence Act, as being a transaction by which the right claimed in this suit by the plaintiff was asserted and denied.

Both the Courts considered the judgment admissible in evidence, and upon the strength of it decided in the plaintiff's favor.

It has now been contended before us on Special Appeal, that the lower Courts were wrong in admitting the former judgment as evidence in this case; and upon this one point the Special Appeal depends.

It has been decided by this Court in several cases, three of which are reported in 23 W. R., 162, 296, and 311, that decrees in suits between third parties are admissible in evidence under section 13 of the Evidence Act, whilst in other cases in this Court such evidence has been constantly rejected.

The question, therefore, referred to the Full Bench is:—

Whether, under section 13, or any other section of the Evidence Act, the judgment in the former suit, which was admitted and acted upon as evidence in this suit, was legally admissible.

*M. M. Ghose*, and *Baboo Jogesh Chunder Dey*, for the Appellant.

*Baboo Mohesh Chunder Chowdhry*, for the Respondent.

*M. M. Ghose*.—It was not intended that every right should be understood by the words "existence of any right or custom" in section 13 of the Evidence Act. What was intended was to adopt the judgment of Sir BARNES PEACOCK in the case of *Kanhya Lall vs. Radha Churn*, 7 W. R., 338, and to declare relevant only such judgments *inter alios* as have reference to such rights as rights of way, or of ferries. Section 13 refers only to incorporeal rights.

will probably be contended, that the last words of section 43 make the judgment in the present case admissible.

Under the Evidence Act such judgments were undoubtedly admissible; and that it was not intended that that Act should require any alteration in the law in this respect appears from the "Objects and Reasons" of the Act, which it is submitted should be referred to and read in Court—*Mew vs. Thorne*, 31 L. J., 88.

THE CHIEF JUSTICE, C.J.—The document which you would refer to is the opinion of the Legal Member of Council, when a local bill was being passed. We do not think it is necessary in this case to read the "Objects and Reasons." We will, however, express no opinion, whether such a document might be admitted.

If judgments are admissible in evidence under section 13, section 43 is surplusage.

THE CHIEF JUSTICE, J.—If section 13 was intended to have reference to public rights and customs only, why should public rights and customs again be treated of in section 32, clause 4 ?]

The right or custom intended to be covered by section 13, whether a public right or custom was held in *Koondoo Nath Surmah v. Dheer Chunder Surmah*, 20 W. R., 345.

THE CHIEF JUSTICE, C.J.—From the preamble it appears, that the object of the Act was "to consolidate, define, and amend, the law of evidence." That being so, we could hardly expect to find an entire revolution in the law of evidence introduced.]

The case of *Nizamut Ali vs. Guru Doss*, 22 W. R., 365, may be relied upon by the other side, was really a judgment *inter partes*. So also were the cases of *Guttu Koiburto vs. Bhukut Koiburto*, 22 W. R., 457; *Roop Chund Bhukut vs. Kishen Doss*, 23 W. R., 162; and *Omer Dutt Jha vs. Omer Dutt*, 24 W. R., 470.

THE CHIEF JUSTICE, J.—Section 40 deals with estoppels, but many judgments may be evidence *inter partes* which are not estoppels, and are not admissible under section 40. If such decisions are admissible under section 13, they are not, it appears to be admissible under any other section.]

Bombay case of *Naranji Bhikabhai vs. Dipa Umed*,

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I. L. R., 8 Bom., 3, is no doubt against my contention, but there is abundant authority in my favour in this Court. In *Bahadoor Singh vs. Afzul Khan*, 19 W. R., 156, and *Shaikh Wahid Ali vs. Nauth Tooraho*, 24 W. R., 128, judgments not *inter partes* were rejected.

[PONTIFEX, J.—The latter case seems to have been put partly upon the ground, that the plaintiffs who were not parties to the previous judgment, had had no opportunity of cross-examining a witness, who spoke to the validity of a certain pottah.

In the cases of *Gunee Gazee vs. Anundo Chunder Chandra*, 25 W. R., 458; *Lalla Mahadeo Dyal Singh vs. Chundee Pershad*, 25 W. R., 57, the Court refused to admit judgments in evidence against persons who had not been parties to the suits in which they had been passed, on the ground that they had not been parties.

[MITTER, J.—What difference does it make that judgments are not *inter partes* ?]

If they are *inter partes*, then section 13 of Act X of 1877 operates to make them estoppels.

[GARTH, C.J.—From Taylor on Evidence, Ed. of 1868, paras. 78 and 1486, it appears that in America judgments, when given in evidence, are treated as estoppels, though not pleaded. And here, I take it, under section 13, they would be dealt with in the same way.

In the present case it is submitted that there is no question of right or custom within the meaning of section 13. A fact only was proved from which a right could be inferred, but that is not sufficient.

Baboo *Mohesh Chunder Chowdry*.—Although the plaintiff was not a party to the judgment, which it is sought to use against the defendants, the defendants were parties, and so the judgment is admissible in evidence, though not conclusive—*Lala Runglal vs. Deonarayan Tewary*, 6 B. L. R., 69. See also *Naranji Bhikhabhai vs. Dipa'umed*, I. L. R., 3 Bom., 3.

[PONTIFEX, J.—You might put your case in this way: Suppose A conveys land to B, and then sues C for it, then C may put in the conveyance. But if A sues B, and judgment is given in favor of B, then if A bring a suit against C for the

same land, why should not C be allowed to use the judgment against A in the former suit?]

If the existence of the judgment is a relevant fact, as I submit it is, the judgment in this case is admissible, under section 11 of the Evidence Act, as a relevant fact.

The definition of a "fact" is sufficiently wide to include the conclusion to which a Court has come in a former suit.

[GARTH, C.J.—I fail to see that an opinion which a Judge expresses is a fact.]

The word "fact" in section 35 is sufficiently wide to include a judgment.

M. M. Ghose replied.

The following judgments were delivered by the Judges of the Full Bench (1) :—

MITTER, J. :—

MITTER, J.

In this case I have the misfortune to differ from His Lordship the Chief Justice and my other colleagues. But the importance of the question referred to the Full Bench, and the fact that the majority of the decided cases on the point are in favor of the view I take, I apprehend, justify me in stating fully the grounds of the conclusion at which I have arrived.

Sections 40 to 43 of the Evidence Act deal with the subject of relevancy of judgments, orders, or decrees of Court.

Section 40 provides, that the existence of a judgment, decree, or order, is a relevant fact, if it by law has the effect of preventing any Court from taking cognizance of a suit, or of holding a trial.

Section 41 deals with what are usually called judgments *in rem*; and by section 42, judgments relating to matters of a public nature are declared relevant whether between the same parties or not. Then section 43 provides that "judgments, orders, decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the fact that such a judgment, order, or

(1) GARTH, C.J., JACKSON, PONTIFEX, MORRIS, and MITTER, J.J.

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decree existed is irrelevant under some other provision of this Act."

It is clear that the judgment mentioned in the order of reference is not relevant under sections 40 to 42. Therefore the question that we have to determine is, whether or not it is relevant under some other provision of the Evidence Act so as to bring it within the proviso of section 43.

I am of opinion that it is relevant both under sections 11 and 13.

I shall deal with the question of its relevancy under section 13 first. That section provides: "When the question is as to the existence of any right or custom the following facts are relevant:—

(a.) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence.

(b.) Particular instances in which the right or custom was claimed, recognized or exercised, or in which its exercise was disputed, asserted or departed from."

The existence of a right to some immoveable property is in question in this case. That right was asserted and recognized in a previous proceeding of a Court of Justice; and it seems to me that it would not be unwarrantably straining the language of the section in question to say that that proceeding was "a transaction" within the meaning of section 13, because the word transaction in its largest sense means "that which is done."

If the words "transactions" and "right" be not construed in this way, judgments, decrees and orders, which were, before the passing of the Evidence Act, considered conclusive, and which now, according to the law of evidence as administered in England are considered, when not pleaded as estoppels, cogent evidence, would be excluded. Take for example the following illustration: A brings a suit against B for enhancement of rent. B sets up a mocururi pottah in defence. A Court of competent jurisdiction finds the pottah to be genuine and dismisses the suit. After the lapse of several years B sells his right to C, and A then ejects the latter forcibly. Thereupon

brings a suit against A to recover possession of the land covered by the mocururi pottah. A denies the mocururi right, and alleges that B was a tenant-at-will. Before the Evidence Act was passed the former judgment would have been conclusive evidence of B's mocururi right—(See *Soorjomonee Dayee vs. Uddanund Mahapatter*, 12 B. L. R., P. C., 304; and *Krishna Beri Roy vs. Brojeswari Chowdhranee*, L. R., 2 Ind. App., 283). According to the law of evidence, as at present administered in England, it would equally be considered conclusive, or, if not conclusive, at least as cogent evidence in the subsequent suit. See also Taylor on Evidence, section 1497.)

Was it intended by the Evidence Act to declare such judgments as this irrelevant? But it would be irrelevant unless it is relevant either under section 11 or section 13. It is not relevant under section 40, because its existence does not by law prevent the Court from taking cognizance of the second suit, in the second suit it is the plaintiff who would seek to use it as relevant evidence, and it is apparent that he would not rely on it to bar the cognizance of his own suit. It may be said that, under section 13 of the present Procedure Code, the existence of the first judgment would prevent the Court from holding a trial of the issue as to the mocurruri right of B, and would therefore be relevant under section 40. Supposing that the word "trial" in the section in question refers not only to a minimal trial but also to a "trial" of an issue in a Civil suit, the judgment in question would not have been relevant under section 13 before the present Procedure Code was passed, because under section 2 of Act VIII of 1859 it would not have prevented any Court from holding a trial of the issue as to the mocurruri title in the second suit. Then, again, suppose in the second suit the judgment in question was not produced at or before the trial, and evidence bearing upon this issue was allowed to be adduced; then, suppose at a later stage of the case, the plaintiff produced the judgment in question and satisfied the Court that in the exercise of its discretionary power it ought to give it. Under these circumstances I apprehend, it would not have been admissible under section 40 of the Evidence Act, because its existence would and could not, at that stage of the case,

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have prevented the Court from holding a trial of the issue regarding B's mocrurri title.

The judgment in question then, at least in some cases, not being admissible under section 40, and it being evident that it is not admissible under sections 41 and 42, it would be excluded altogether unless its existence be relevant under some other provision of the Act. But if we construe the words "transactions" and "right" in section 13 in their largest sense, it would be relevant under that section.

But it has been said that the law of evidence, as administered in England, was the law of evidence in force in this country before the Evidence Act was passed; that the judgment of the description mentioned in the order of reference is and was not admissible under English law; and that if the Legislature intended to alter the law in this respect it would have done so by a more clear and express provision than what is contained either in section 11 or section 13.

But I apprehend that the law of evidence as administered in England was not in its integrity the law in force in this country before the passing of the Evidence Act. The statutory provision on this subject was contained in the second paragraph of section 24 of Act VI of 1871, which is to the following effect:—In cases not provided for by the former part of this section, or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience. This is only a re-enactment of the provisions of section 15 of Regulation III of 1793. Therefore, so far as the Legislative enactments go, there is no foundation for this proportion.

Upon the examination of the decided cases on the subject it would be found to be equally untenable.

The question was fully discussed by Mr. Justice MAREY in *Doorqa Doss Roy Chowdhry vs. Nurendro Coomar Dutt Chowdhry*, 6 W. R., 232, and he came to the conclusion that the rule of English law was not applicable "in all its strictness" to Mofussil Courts in this country. I may as well cite here the observation of the Judicial Committee upon this point in the case of *Unide Rajaha Raje Bahadoor vs. Pemmasamy Venkatadry Naidoo*, 7 M. I. A., 128: "With regard to the admissibility



of evidence in the native Courts in India, we think that no strict rule can be prescribed. However highly we may value the rules of evidence as acknowledged and carried out in our own Courts, we cannot think that those rules could be applied with the same strictness to the reception of evidence before the native Courts in the East Indies, where it is perfectly manifest the practitioners and the Judges have not that intimate acquaintance with the principles which govern the reception of evidence in our own tribunals; we must look to their practice, we must look to the essential justice of the case, and not hastily reject any evidence because it may not be accordant with our own practice. We must endeavour, as far as the materials will allow us, having received the evidence to ascertain what weight ought properly to be ascribed to it, and more especially where we find that it has been the practice of the Court to receive documentary evidence without the strict proof which might here be considered necessary; indeed the consequence of so doing would inevitably be, if the strict rule were adhered to, to reject the most important evidence, not only in this case, but almost in every other." (p. 137.)

In another case—*Nargunty Lutchmeedavamah vs. Vengama Naidoo*, 9 M. I. A., 66, p. 90—the Judicial Committee observed: "The native Courts of India in receiving evidence do not proceed according to the technical rules adopted in England, and they would, by their usual practice, admit a copy of a public document, authenticated by the signature of the proper officer, as *prima facie* evidence subject to further inquiry "if it were disputed."

There is, therefore, no foundation for the proposition that before the passing of the Evidence Act the law of evidence, as administered in England, was applied with all its *technical strictness* to Mofussil Courts in the country. On the other hand they were guided by their own practice, which was to a great extent moulded on principles of *substantial* justice. Acting upon this principle the Courts in this country, before the passing of the Evidence Act, always held that judgments of the description mentioned in the order of reference were admissible in evidence. See 1 W. R., 232, 14 W. R., 201. In this latter case, speaking

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of a judgment of the description in the order of reference, Mr. Justice D. N. MUTTER says: "That decisions like the one under our consideration have been frequently admitted in our Courts as evidence is, I believe, a proposition beyond all dispute; and I do not see any reason why we should depart from this practice merely because it is opposed to the English law of evidence. The observation of Mr. Taylor in section 149 shews that in his opinion also the propriety of this rule of English law is questionable."

The law of evidence as administered in England was not therefore in its integrity the law in force in the Mofussil Courts of this country, and that according to the practice of these Courts, before the passing of the Evidence Act, decisions like the one under consideration were admitted in evidence. It seems to me that we ought not to come to the conclusion that this rule of law, founded as it was on a long practice of the Mofussil Courts, was altered by the Evidence Act, unless that was clearly made out by the provisions of the Act itself. Then, again, if we do not construe section 13 in the way I have suggested above, the result would be that a class of judicial proceedings, which were always considered as furnishing cogent evidence on the question of possession, would be excluded. I refer to awards under Act IV of 1840, and the corresponding sections of the Criminal Procedure Code. They have been invariably acted upon as affording valuable evidence of possession even after the passing of the Evidence Act. They would not be relevant under section 40, because, apart from other grounds, a proceeding under Act IV of 1840 before a Magistrate cannot be called "a suit" within the meaning of section 13 of the Civil Procedure Code. Then if these awards are not admissible either under section 11 or section 13 of the Evidence Act they would not be relevant at all. I would hesitate to come to the conclusion that the Evidence Act was intended to exclude this class of evidence unless it was made out as clearly as possible from its provisions.

Then it has been said that in section 13 of the Evidence Act the Legislature intended to refer to incorporeal rights only because in other parts of the Act, for example in sections 32 and 48, where the same word occurs in conjunction with the word "custom" it

has been used in that sense. In the first place it is by no means clear that sections 32 and 48 deal only with incorporeal rights. It is not impossible to conceive of a corporeal right being of a public or general nature. It is true that in the generality of cases such rights are incorporeal, but it is by no means confined to that class only. Then, in the next place, the word "right" is qualified by the word "public" in clause 4, section 32, and by the word "general" in section 48. There is no such qualification in section 13.

Moreover, no reasonable ground can be suggested for the necessity of restricting the meaning of the word "right" in section 13 to the class "incorporeal." The contention of the appellant does not go to the extent of limiting the section to incorporeal rights of a *public* nature only. In that case no doubt it could be explained upon the ground that such construction would have the effect of assimilating the provisions of the Evidence Act to the rule of English law on this subject. But the contention that the section in question refers only to incorporeal rights, whether of a public or private nature, does not seem to me to be warranted by any general principle. It is difficult to suggest a reason which would justify the existence of a distinction between the rules applicable to the proof of corporeal and incorporeal rights respectively, whether of a public or private nature. Why should the transaction of the nature described in section 13 be relevant when A claims a right of way over a piece of land held and owned by B, and not so when he claims the land itself, appears to me inexplicable. It seems to me that the distinction would be arbitrary. I may as well here state a special consideration which leads me to think that the Legislature, by the use of the word "transaction," intended to include proceedings of Courts also. Is it at all reasonable to suppose that a *mere assertion* of a right by a person setting it up, whether that right is corporeal or incorporeal, it is quite immaterial for the purposes of this argument, would be admissible as evidence, and not *the recognition* of it by a Court of Justice? Certainly it seems to me to be highly improbable that that was the intention of the Legislature.

for these reasons I am of opinion that the judgment men-

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tioned in the order of reference is relevant under section 13 of the Evidence Act.

Then, as regards its admissibility under section 11, it has been said that a judgment is not a fact as defined in the Act itself. It is true that the *reasons* of a decision cannot be called "*facts*" within the meaning of the Evidence Act, but the result of a particular judgment, i.e., whether it is favorable or unfavorable to a particular party, is, it seems to me, a fact as defined in that Act.

Illustration (d) of section 43 is as follows:—A has obtained a decree for the possession of land against B. C., B's son, murders A in consequence. The existence of the judgment is relevant as showing motive for a crime.

Now the decree referred to in the illustration can only be relevant under sections 7, 8, or 11. In all these sections I find the word used is "fact," consequently it follows that the word fact, as defined in the Act itself, includes decrees and "judgments." Besides, the definition itself is comprehensive enough to include them.

If, therefore, the word fact, as defined in the Evidence Act, is comprehensive enough to include decrees and judgments, then it seems to me that the judgment mentioned in the order of reference would be relevant, because it having recognised the right of the plaintiff to the present suit, by itself, and in connection with the circumstance that it was so recognised, notwithstanding the evidence adduced by the defendant, makes the existence of the fact in issue in this suit highly probable.

Again, it may be said that if we are to admit the judgment under consideration as evidence we must also hold that a judgment, to which the person against whom it is sought to be used was not a party, would also be admissible, because the sections in question make no distinction between these two classes of judgments. It is true that that would be the consequence, but *ordinarily* no weight should be attached to a judgment between other parties. A similar objection may be urged against the rule of English law, by which in matters of public interest, such as a claim of highway, evidence of reputation from *any one* is receivable (see section 545 of Taylor on Evidence.) For example, in a

a highway alleged to be existing in an obscure village district of Nuddea, evidence of reputation of an inhabitant there, evidently not possessing any information on the subject, would be receivable. But what weight would be attached to such testimony? Similarly, when a judgment would be sought against a person who was not a party to it, ordinarily no weight ought to be attached to it. I say *ordinarily*, there might be special circumstances which might give weight which it otherwise would not have. For instance, it was proved that a particular person, although not *formally* a party to a previous proceeding, was yet substantially represented in it because the whole control of that proceeding was in his hands, then it would be just and reasonable to attach to the previous judgment some weight in that case. It seems to me that the Legislature in enacting these sections has laid out the principle which was laid down by the Judicial Committee in the case already cited, viz., to leave it to a Court in each particular instance to assign the proper weight to a previous judgment that might be produced as evidence in a cause.

I would, therefore, answer the question in the affirmative.

X, J. :—

PONTIFEX, J.

Considering the rules of evidence it is well to look to the effect of the matter.

In respect to judgments *inter partes* it would be unreasonable to require a person who has proved his case once against his opponent, to be given a full opportunity of rebutting it, should be compelled to adduce his proofs against the same opponent. For otherwise there would obviously be no end to litigation.

It is by no means unreasonable that a person who has already been put to the trouble and expense of adducing evidence should be treated in the same way as if his opponent had obtained no adverse judgment in any other proceeding.

Equal opportunities of proof are open as were open to a successful litigant in the first proceeding. Why should a party to that proceeding be excused from furnishing evidence in the ordinary course.

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 PONTIFEX, J.

In a matter of public right the new party to the second proceeding, as one of the public has been virtually a party to the former proceeding, and therefore he is properly excused.

The observations of the Privy Council, quoted by Mr. Justice Mitter, seem to me to refer more to matters of form, than to matters of substance, and to apply to the manner in which a case should be treated by the final tribunal, after having passed through all its stages.

But the matter we have to deal with is essentially one of substance and not of form, and in giving our judgment we shall be laying down the principle on which a case ought to be tried in its earliest stage.

The reason of the matter being, as it appears to me, against the admission in evidence of a judgment not *inter partes*, I think we ought not to give a forced construction to sections 11 and 13 of the Evidence Act, which construction would also, as pointed out in the judgment of the Chief Justice, which I have had the opportunity of seeing, make sections 40 to 43 surplusage.

I remain of opinion that the judgment in question in this reference is neither a fact within the meaning of section 11 nor a "transaction" within the meaning of section 13.

JACKSON, J. JACKSON, J. :—

It is my opinion the previous judgment was not admissible as evidence in this case.

In order to come to a conclusion on this point it seems to me a relevant fact that the Indian Evidence Act of 1872 was passed by the Legislature of this country under the direction of a skilled lawyer for the express purpose of consolidating, defining and amending the law of evidence in India; that the construction of the Act is marked by careful and methodical arrangement; and that many of the more important expressions used in it are plainly interpreted.

It would be wholly inconsistent with the plan of such an enactment, that a specific rule contained in one part of it should at the same time be contained in, or deducible from, one or more other rules relating apparently to topics quite distinct, which rules should be at the same time so expressed

as to include not merely the specific rule in question, but also matters which that rule taken by itself would specifically exclude.

If we are to accept the argument for the respondent in this case, a judgment becomes relevant, not only as a judgment but also as a transaction, and again as a fact. If this be so, it is not very easy to see why the framers of the Act should have taken the trouble to frame the elaborate provisions which follow.

On the other hand, when, in a law prepared for such a purpose, and under such circumstances, we find a group of several sections prepared by the title "judgments of Courts of Justice when relevant," that seems to me a good reason for thinking, that as far as the Act goes, the relevancy of any particular judgment is to be allowed or disallowed with reference to those sections.

But admitting, for the sake of argument, that the Act could have been drawn in so loose and unskilful a fashion, I proceed to consider whether the judgment in question can be admitted as a transaction or as a fact.

The kind of transaction relied on is that mentioned in section 13, where the question is as to the existence of any right or custom. It seems to me as clear as anything can be that the right here spoken of is something quite distinct from ownership. How can it properly be said, when the question between the plaintiff and respondent is, which of them is entitled to a thing, that the question relates to the *existence of a right*? That some one has a right to the property is undoubted. The question is to whom it belongs? What is referred to in the section cited is evidently a right which attaches either to some property or to *status*—in short, incorporeal rights, which though transmissible are not tangible, or objects of the bodily senses. To this interpretation the object, the particular facts selected, and the illustrations to the section, all seem to me to conduce.

But in addition I cannot look upon the description of a judgment of a Court of Justice as a transaction otherwise than as a misuse of language, nor can any of the verbs which must come in to complete the relevancy of such transaction be properly used in respect of judgments. A transaction, as the derivation denotes, is something which has been concluded between persons

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by a cross of reciprocal action as it were, whereas the judgment of a Court is something imposed by the authority of the tribunal. But the Court neither creates, claims, modifies, recognizes, asserts nor denies a right or custom. It determines for or against it. Consequently, in every point of view from which this section can be looked at, it seems to me wholly inapplicable to the case.

But then it is said that the judgment is a fact and a relevant fact under section 11.

No doubt everything which has been called into being by some agency or other is in the widest sense a fact, and in a certain sense it may be said that a judgment is a fact within the meaning of section 3 of the Evidence Act, and facts are relevant when connected with another fact in any of the ways referred to in connection with relevancy.

Now, if we strip a judgment of the peculiar character of authority given to it by section 40 *et seq.*, all that it amounts to is this, that A and B were before L, who is a Judge on a particular day, and that L formed a particular opinion on a subject as to which A and B were at issue. This, according to the argument, makes it highly probable that X, as a different Judge should come to the same conclusion upon a similar dispute between A and C.

That the Legislature should have intended to give that sort of efficacy to the judgments of the Courts I should have much difficulty in believing, even if the words otherwise suggested the construction, which in my opinion they do not.

I have had the opportunity of reading the judgment which the Chief Justice proposes to deliver, as well as the observations of my brother PONTIFEX, in both of which I generally concur, and for the reasons there stated, and those which I have shortly given, I consider the evidence not admissible.

GARTH, C.J. GARTH, C.J. :—

I am of opinion that the former judgment was not admissible as evidence in this suit.

It was contended in the first place, that it was admissible under section 13 of the Evidence Act, as being a "transaction" in



which the right in question in the present suit was claimed and recognised.

I consider that the former judgment was not a "transaction," and that the right claimed in this suit is not "a right" within the meaning of section 13.

A transaction in the ordinary sense of the word is some business or dealing, which is carried on or transacted between two or more persons. If the parties to a suit were to adjust their differences *inter se*, the adjustment would be a transaction; and, by a somewhat strained use of the word, the proceedings in a suit might also be called "transactions"; but to say that the decision of a Court of Justice is a transaction appears to me a misapplication of the term.

Then, again, as to the meaning of the word "right" in this section, it is argued by the respondent's Counsel that it means *any, right* which can possibly be made the subject of a suit; but if this were its true meaning, the provisions of the section would necessarily apply to all suits, because the plaintiff in every suit claims a right of some kind, the existence of which forms the ground of his claim. Surely this view is inconsistent with the first sentence of the section; because that sentence seems very plainly intended to confine its operation to a particular class of suits, viz., those in which "a question as to the existence of some right or custom" is raised.

It may be difficult perhaps to define precisely the scope of the word "right," but I think it was here intended to include those properties only of an incorporeal nature which, in legal phraseology, are generally called "rights," more especially as it is used in conjunction with the word "custom."

It is certainly used in that sense in subsequent parts of the Act (see section 48 and sub-section 4 of section 32), which deal with matters of public or general "right or custom," and in section 13 the word is probably intended to include both public or private rights of that nature.

The "right of fishery" mentioned in the illustration is a right which may be either public or private according to circumstances.

That the expression is used in this limited sense is shewn

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Judgment.  
—  
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also, as it seems to me, by the words with which it is associated. The right mentioned in the section is one which can be "created" or "exercised," which expressions are perfectly appropriate when speaking of an incorporeal right, but would be wholly inapplicable to the word "right" when used in its more extended sense. It would be quite correct to speak of the *creation* or the *exercise* of a right of way, or of a franchise, but no lawyer would think of saying that a right to a chattel or to damages had been "created" or "exercised."

I consider therefore, in the first place, that the judgment in the former suit is not a "transaction" within the meaning of section 13; and in the next place, that if it were, it does not relate to the sort of right which is intended by the section.

But then it is argued that if the former judgment was not admissible under section 13, it was so under section 11, as being a "fact" which, either by itself, or taken in connection with other facts, makes the case set up by the defendant improbable.

No doubt the former judgment decided that the present defendant was not entitled to the right which he claims in this suit, but the question is, whether that decision can be properly considered as a fact.

If it can, then all judgments or decisions of a Court of Justice, whatever may be their nature, and whoever may be the parties to them, would be equally admissible under section 11, so long as they contained an adjudication which is adverse to the claim of either party in a subsequent civil suit.

Thus a decision by a third class Magistrate in a criminal proceeding, with reference to the possession of land or other property, would be admissible as evidence in a civil suit between third parties, who were not represented in that proceeding, provided only that the decision of the Magistrate was adverse to the claim of either party to the suit. As for instance, if the Magistrate decided, that X was in possession of certain property, his decision would be admissible in a subsequent civil suit between A and B, where both claimed the same property, in order to show the improbability, that at the time of the Magistrate's decision the property belonged either to A or B.

It is said that in this particular case the defendant, against

whom the former judgment is sought to be used, was the plaintiff in the former suit, and had therefore ample opportunity in that suit of contradicting the evidence that was brought against him. But section 11 makes no exception in favor of that or any other class of cases. If a previous adverse judgment is admissible in a civil suit under that section, it matters not what may have been the nature of the previous proceeding, nor who may have been the parties to it.

I consider that an adjudication or opinion expressed in an judgment is not properly speaking "a fact," and certainly not a fact within the meaning of section 11. The delivery or existence of the judgment itself may be a fact, but the decision which the judgment contains, is no more a fact than an opinion expressed by any other person who is not exercising judicial functions. Thus, if an opinion were given by the Legal Member of Council, in answer to a question by the Government, or by a person skilled in any art or science, with regard to some matter especially within his own province, that opinion, as it seems to me, would be quite as much a fact, and as admissible in evidence under section 11, as the decision of a Judge upon a question which it was his duty to determine.

Bpt apart from these considerations, which arise out of the particular language of sections 11 and 13, I think that upon far higher or more substantial grounds it is plain that the Legislature could never have intended to allow that wholesale departure from the English law upon this subject, which the respondent's contention would involve, and that they certainly never intended to effect that departure, by means of sections 11 and 13, which professedly do not relate to judgments at all.

I suppose that it must be generally acknowledged, that with some few exceptions the Indian Evidence Act was intended to, and did in fact, consolidate the English law of evidence.

The different chapters of the Act deal *seriatim* with the relevancy, and consequent admissibility, of the different kinds of evidence; and upon this principle sections 5 to 16 deal with the admissibility of *facts*, whilst sections 40 to 45 deal expressly with *judgments*; and I cannot help thinking, with all deference to the opinion of those learned Judges who have expressed a contrary

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opinion, that if it had been really the intention of the Legislature to depart entirely from the English rule, and to make a very large class of judgments admissible here, which had never been admissible before the Act, either in England or this country, they would have expressed their intention more plainly by means of suitable provisions introduced into that portion of the Act which deals exclusively with judgments.

If there is one rule of law, which is better known and approved than another, as being founded upon the most manifest justice and good sense, it is this : That (except in the case of judgments *in rem*, and judgments relating to matters of a public nature, which are governed by a different principle), no man ought to be bound by the decision of a Court of Justice, unless he, or those under whom he claims, were parties to the proceeding in which it was given.

But if the construction, which the respondent would put upon section 13 is the correct one, any judgment of a competent Court, founded upon any conceivable right, would be evidence in any subsequent suit relating to the existence of the same right, although the parties to the two suits might be altogether different. And it is argued, moreover, that this radical change in the law of evidence has been brought about, not by any direct enactment upon the subject of judgments, but by treating judgments as "transactions" under section 13, and giving to the words "transaction" and "right" in that section what appears to me to be an incorrect interpretation.

And with all due respect to the learned Judges who have adopted this view, I would add that the mistake, (as I consider it), into which they have fallen, has arisen in great measure from an erroneous supposition that under sections 40 to 43 the English law upon the subject of judgments has been imperfectly enacted, and that, in order to give it its full scope, it is necessary to have recourse to sections 11 and 13.

Thus it has been considered, that section 40 only makes former decrees admissible, when they have the effect of preventing a Court of Justice from taking cognizance of a suit, that is, from dealing with a suit in its entirety; and that the words "holding a trial" must necessarily refer to criminal proceedings only.

This construction of section 40 would, of course, confine its operation very materially. For example, in a suit for three years' rent, if a former decree had decided against the claim as regards the first year's rent only, that decree would by law be a bar to the suit as regards that one year's rent. But in the view which has been taken of the section, the decree, though a bar to the second suit *pro tanto*, would not be admissible in evidence under that section, because it would not prevent the Court from taking cognizance of the whole suit, but only of a part of it.

So again, if in answer to a suit, some ground of defence were set up, which had been decided against the defendant in a former judgment, although undoubtedly a legal bar to the defence set up, would not be admissible under section 40, because it would not prevent the Court from taking cognizance of the suit, but only of a defence set up to it.

But surely it could never have been the intention of the Legislature to confine the effect of section 40 in this way,—to let in as relevant evidence under that section one portion of a class of judgments which operate by law as estoppels, and to leave another portion of the same class of judgments, which operate equally as estoppels, to be admissible as transactions under some other section of the Act.

It is true, that section 40 might have been more clearly worded. It has in fact much the same defect as section 2 of Act VIII of 1859, which was pointed out by the Privy Council in the case of *Soorjomonee Debya vs. Suddanund Mohapatter*, (12 B. L. R., P. C., 304.) But I cannot doubt that it was intended to include all judgments, which by law operate to prevent a Court, whether civil or criminal, from taking cognizance of a suit, or trying any particular issue.

The words "holding a trial" are amply large enough to admit of this construction. And it is not because in some other Act the words "holding a trial" may have been construed to refer to criminal trials only, that we ought to confine their meaning in the same way in section 40 of the Evidence Act.

If this view is right, it disposes, as it seems to me, of the only difficulty suggested by the respondent, and it will be found

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that many of the judgments, which in the cases cited to us in argument have been held by learned Judges to be admissible under section 13 only, were really admissible under section 40.

Thus in the case, put by my learned brother, Mr. Justice MITTER, in his judgment, of the *mocurruree pottah*, the former judgment would undoubtedly be admissible under section 40, and would have the effect of prohibiting the Court from trying the same issue a second time.

So, in the case cited from I. L. R., 3 Bom., 3, decided by Sir MICHAEL WESTROFF and Mr. Justice MELVILL, I entirely agree in the conclusion arrived at by those learned Judges, because I consider that the former decrees were clearly admissible under section 40, and were conclusive between the parties *as to the existence of the plaintiff's right at the time when those decrees were passed.*

Section 40, in my opinion admits as evidence all judgments *inter partes*, which would operate as *res judicata* in a second suit. Section 41 admits judgments *in rem* as evidence in all subsequent suits where the existence of the right is in issue, whether between the same parties or not. And section 43 admits all judgments, not as *res judicata*, but as evidence, although they may not be between the same parties, provided they relate to matters of a public nature relevant to the inquiry.

Putting this construction upon these three sections, it will be found that they do really embody the English law as to the admissibility of judgments, as it existed at the time when the Evidence Act was passed; and it would be strange indeed, if having taken the pains to confine by these sections the admissibility of judgments to these cases, where they would be admissible by English law, the framers of the Act had, by another and a previous section, disregarded the English law entirely, and had admitted as evidence *all judgments, whether between the same parties or not* which related to the same subject-matter.

It is obvious that if the construction which the respondent's Counsel would put upon section 13 is right, there would be no necessity for sections 40, 41 and 42 at all.

Those sections would then only tend to mislead, because the judgments which are made admissible under them would all

be equally admissible as "transactions" under section 13, and not only those, but an infinite variety of other judgments which had never before been admissible either in this country, or in England.

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And it is difficult to conceive why, under section 42, judgments, though not between the same parties, should be declared admissible "*so long as they related to matters of a public nature,*" if those very same judgments had already been made admissible under section 13, *whether they related to matters of a public nature or not.*

But then it is said, that section 43 expressly contemplates cases, in which judgments would be admissible under other sections of the Act, which are not admissible under sections 40, 41, or 42. This is quite true. But then I take it, that the cases so contemplated by section 43 are those where a judgment is used not as a *res judicata*, or as evidence more or less binding upon an opponent by reason of the adjudication which it contains, (because judgments of that kind had already been dealt with under one or other of the immediately preceding sections), but the cases referred to in section 43 are such, I conceive, as the section itself illustrates, viz., when the fact of any particular judgment having been given is a matter to be proved in the case.

As, for instance, if A sued B for slander, in saying that he had been convicted of forgery, and B justified, upon the ground that the alleged slander was true, the conviction of A for forgery would be a fact to be proved by B, like any other fact in the case, and quite irrespective of whether A had been actually guilty of the forgery or not. This, I conceive, would be one of the many cases alluded to in section 43.

Then, again, it was argued that in this country the rules of evidence in the Mofussil, especially as to the admissibility of former decrees, were never so strict as in England, and in support of that contention several cases were cited to me, decided by Mr. Justice Dwarka Nath Mitter and other eminent Judges of this Court; and we were referred to certain observations made by their Lordships of the Privy Council to the same effect (see 7 M. I. App., 128.)

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But those cases, it must be borne in mind, occurred many years ago, at the time when the practice in the Mofussil in this respect was very lax, and before the Evidence Act was passed; and the observations of the Privy Council were made, as I humbly conceive, not as approving of this laxity of practice, but rather as excusing it, upon the ground that the Mofussil Courts were not at that time sufficiently acquainted with our English rules of evidence, to be able to observe them with anything like accuracy.

I conceive that one great object of the Evidence Act was to prevent this laxity, and to introduce a more correct and uniform rule of practice than had previously prevailed; and if that Act can now be made the means, as I trust it will, of preventing the mischief which too frequently occurs of decrees between third parties being improperly admitted as evidence in Mofussil Courts, it will prove a very valuable aid to the administration of justice. I consider that the reception of loose evidence of that kind is especially dangerous in a country like this, where unhappily, decrees are so often collusively obtained for no other purpose than to make them evidence in future suits between third parties.

It was argued that, instead of binding the Courts of this country by the strict rules of evidence, it would be more desirable, and was in fact the intention of the Evidence Act, to render all decrees admissible in evidence "as facts or transactions," leaving it to the discretion of the Courts to attribute to each judgment its due weight. But to my thinking this liberty of action would be extremely unsafe, and I certainly am not surprised to find that the Legislature here were unwilling to leave to the Subordinate Courts in this country a discretion which it has not been thought safe or right to entrust to English Judges.

I am, therefore, of opinion that the former judgment was not admissible in the present suit. And as the majority of this Court are of that opinion, the case must go back to the Court below to be decided upon the other evidence.

The appellants will be entitled to their costs in this Court; and those of the Court below will follow the result of the suit.



MORRIS, J. :—

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I agree with the Chief Justice in holding that the former judgment was not admissible as evidence in the present suit.

[CRIMINAL JURISDICTION.]

IN THE MATTER OF THE PETITION OF P. QUIRAS AND  
F. C. MAUNDERS.

June 15th.

No. 116 of  
1880.

*Criminal Procedure Code (Act X of 1872), sections 72 and 84—European  
British subject—Jurisdiction Waiver of.*

Section 72 must be strictly construed in connection with section 84 of the Code of Criminal Procedure, and before a European British subject can be considered to have waived the privilege conferred upon him by the former section, it must appear that his rights under that section have been distinctly made known to him, and that he has been enabled to exercise his choice and judgment whether he would or would not claim such rights.

*In re Foy*, 1 Tay. and Bell Rep. 226; and *Reg. vs. Bholanath Sen*, I. L. R., 2 Cal. 23.

**C**RIMINAL MOTION to set aside a conviction passed by one of the Magistrates of Raneegeunge.

In this case four employés of the East India Railway Company were tried for and convicted of riot in Assensole, and sentenced by the Magistrate, two of them to fines, and two of them to two months' rigorous imprisonment. The Magistrate, in his decision, stated that the defendants were British subjects, but that they had stated that they had no objection to his trying them, and that he accordingly tried them, although he was not a Justice of the Peace and had only Second-class powers.

A Rule was applied for, and obtained on behalf of the present petitioners, who had been sentenced to two months' rigorous imprisonment, calling upon the Magistrate to show cause why the conviction should not be set aside. An order was at the same time made for the records to be sent up to the High Court.

The affidavit, upon which the Rule was granted, stated that the petitioners did not know their privilege as British subjects to be tried by a Magistrate of the first class and a Justice of the Peace.

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*In re*  
QUIRAS.Judgment.

On the Rule coming on for hearing,

*Piffard* and Mr. S. J. Leslie, appeared for the Petitioners.

*Piffard* contended that a second-class Magistrate had no jurisdiction in the case of British subjects, and that if he had no jurisdiction the consent of the defendants could not give him jurisdiction;—*In re Foy*, 1 Taylor and Bell, 226. He further argued that although section 84 of the Code of Criminal Procedure enacted that if a British subject did not claim his right, he was to be held to have waived it, yet this would not give jurisdiction to a Magistrate of the second class who, under section 72, had no jurisdiction.

As the Magistrate, he said, did not inform the defendants of their privileges as British subjects, their answer that they had no objection to being tried by him could not be regarded as a waiver of their rights.

The judgment of the High Court (1) was as follows :—

JACKSON, J. JACKSON, J. :—

We are of opinion that the provisions of section 72 of the Code of Criminal Procedure, relating to the kind of Court which shall have jurisdiction, and shall not have jurisdiction, to enquire into a complaint, or try a charge against a European British subject, do in fact constitute a privilege, that is to say, that they are not so much words taking away entirely jurisdiction, as words which confer on the British subject a right to be tried by a certain class of Magistrates and by no others, which right the Code enables him to give up. It appears to us that that is the only view of the section which is compatible with a reasonable construction of section 84. We have had cited to us a case with which we are of course familiar—the case of *In re Foy* (1 Taylor and Bell's Reports, p. 226) in which judgment was given by Sir L. PEARCE; and a more recent case before Mr. Justice MACPHERSON and my brother MORRIS *Reg. vs. Bholanath Sen*, I. L. R. 2 Cal. 23. The case of *In re Foy* it appears to me unnecessary to mention here at present, because the

(1) JACKSON and TOTTENHAM, J.J.

state of the law, and the state of the jurisdiction under which that case was decided, was altogether different and has in fact passed away. In regard to the judgment delivered by Mr. Justice MACPHERSON I entirely concur in it, and for this reason that there is nothing in the Code of Criminal Procedure, and I apprehend there never could be any provision which would enable an accused person to waive an objection to jurisdiction which was not personal to himself, that is to say, no person could by waiver or consent enable a Magistrate or a Judge to try a case which he is disqualified to try by some circumstances not personal to the accused. That was the case in the matter before Mr. Justice MACPHERSON. There it was alleged that of the three Magistrates who constituted the Bench, one, the presiding Magistrate, was the virtual prosecutor, and another had himself a personal and pecuniary interest in the case, and therefore no consent of the prisoner could get over these disqualifications. As to section 84 the language is peculiar. It does not declare that a European British subject may waive his privilege, but it provides that, if a European British subject does not claim to be dealt with as such before the Magistrate before whom he is tried or committed, he shall be held to have waived his privilege as such European British subject. Mr. Piffard suggested to us that the meaning of the words "waive his privilege" in that section is, that the accused, while retaining all his right, as to want of jurisdiction which section 72 confers, so that he could not be tried except by a particular Court or Magistrate, might yet deprive himself of the right to bring an action for damages. It appears to us that that is not a reasonable construction. We do not think that the Legislature could have meant that a person might be tried or committed by a Magistrate whose act, in so trying or committing him, would be altogether invalid, so that such act could be immediately got rid of by application to the proper Court, but that the accused by waiver should protect the Magistrate so that an action would afterwards lie for damages. It appears to us that the waiver of the privilege spoken of must be an absolute giving up of all the rights with reference to this chapter of the Code of Criminal Procedure which a European British subject has, and the words "dealt with before the Magistrate" mean

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*Judgment.*

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everything contained in this chapter, that is to say, the tribunal having cognizance of the case, the procedure, and also the punishment to which he would be liable.

But then we are also of opinion that section 84 must be construed strictly with section 72, and that we must read them as if they were connected together by the word "but," that is to say, "no Magistrate shall have jurisdiction to enquire into a complaint or try a charge against a European British subject, unless he is a Magistrate of the first class, *but* if a European British subject does not claim to be dealt with as such before the Magistrate before whom he is tried or committed, he shall be held to have waived his privilege;" and clearly we think that before a European British subject can be considered to have waived the privilege conferred upon him by section 72, it must appear that his rights under that section have been distinctly made known to him, and that he must have been enabled to exercise his choice and judgment whether he would or would not claim those rights. Now, in the case before us, for anything that appears to the contrary, the question put to the accused may simply have been whether they had any personal objection to Mr. Casperz as Magistrate to try them. The answer naturally would be, "we have no objection to be tried by Mr. Casperz." But if the question had been:—"You stand here as European British subjects, which I know you to be, and as such British subjects you have the right to claim that you should not be tried except by Magistrates of a certain class to which class I do not belong. Do you claim that right or not?" The answer might have been quite different, and it would be entirely for them to choose whether they would avail themselves of that privilege or not. It does not appear that any such question was put to them in the present case, and therefore we think the proceedings before the Deputy Magistrate were bad, and the conviction must be quashed.

Application had been made by Mr. Piffard that this judgment might apply to the case of two other prisoners who have been also convicted but who are not petitioners before us. We think that Mr. Casperz should be called to state whether, as a point of fact, the provisions of the Code of Criminal Procedure were made known to those two prisoners.

## [CIVIL APPELLATE JURISDICTION.]

OSSAIN DULMIR PURI (PLAINTIFF) . . APPELLANT;  
 AND  
 EKAIT HETNARAIN } (DEFENDANTS) . . RESPONDENTS.  
 AND OTHERS . . . }

• 1880  
 April 4th. •  
 No. 161 of  
 1879.

*Civil Procedure Code, Act X of 1877, sections 503, 505—Receiver, Appointment of—Appeal.*

An order made by a Subordinate Judge, dismissing an application under section 503 for the appointment of a receiver in a suit pending before him, or declining to nominate a receiver, is an order under that section, and not under section 505, and is therefore appealable under section 588 of the Civil Procedure Code, as amended by Act XII of 1879.

A Subordinate Judge, if he has good grounds, may decline to appoint a receiver even after he has received the necessary authority from the District Judge under section 505 to do so.

**A**PPEAL, from a decision passed by the Subordinate Judge of Gya.

The facts and arguments of Court appear from the judgment of the High Court.

*Branson* and *Baboo Prannath Pandit*, for the Appellant.

*M. M. Ghose*, *Baboo Nil Maddub Sen*, *Baboo Amerendernath Chatterjee*, *Baboo Nogendernath Roy*, for the Respondents.

The judgment of the High Court (1) was as follows :—

This is an appeal from an order of the Subordinate Judge of Gya declining to nominate a receiver in a suit pending before him. Mr. Branson supports the appeal. Mr. Monmohun Ghose, for the Respondents, takes a preliminary objection, and contends that there is no appeal from the order in question.

The order, which is dated the 1st of June 1879, recites that the Plaintiff's application is made under section 503. After necessary enquiry it appears that in this case there is no necessity

(1) McDONNELL and BROUGHTON, J.J.

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(to take steps) for preservation or better custody of the disputed property. On the other hand, it appears that this property is, in a manner, under the management of the Collectorate. There is no apprehension of the property being wasted." It was, therefore, ordered that the plaintiff's application for the appointment of a receiver be rejected.

Mr. Monmohun Ghose contends that this order, although it purports to be made on an application under section 503 of the Civil Procedure Code, is made under section 505, and that although the law, by section 588 as amended by section 90 of Act XII of 1879, permits an appeal against an order made under section 503, it does not permit an appeal against an order made under section 505. Sections 503 and 505 must, we think, be read together, for the order is to be made under section 503 by the person designated in section 505, that is to say by the High Court or by a District Judge, or by a Judge of a Court subordinate to a District Judge authorized by the District Judge to make the appointment.

In the case of a Subordinate Judge, which is the present case, the proceeding is to be as follows:—The Subordinate Judge is first to satisfy himself that it is expedient that a receiver should be appointed in a suit before him; then he is to nominate such person as he considers fit to be nominated and submit such person's name, with the grounds for the nomination, to the District Court; then if the District Court shall authorize the Subordinate Judge to appoint the person so nominated, but not otherwise, the Subordinate Judge is to appoint him.

But the District Judge may decline to authorize the Subordinate Judge to make the appointment of the person so nominated, and may himself pass such order as he thinks fit.

The first step to be taken by the Subordinate Judge is to make a judicial enquiry and satisfy himself that it is expedient that a receiver should be appointed. For this purpose he must enquire judicially and satisfy himself upon evidence that the appointment of a receiver is necessary, and recommend a proper person. He does this under section 503. If he refuses to do it, his order refusing the application is an order under section 503, and as such it is now expressly appealable.

The question then is, whether the Subordinate Judge was right in refusing to recommend a person to be appointed as receiver in the case. The appointment of a receiver is a step which should not be taken without special reasons, and that is more particularly the case where the Court is asked to appoint a receiver in a pending suit, such as the present suit, which is to establish a right on the part of the plaintiff to a share in family property which is now in the possession of one of the family, who has been put in possession as manager of the property after due consideration. It must be shown in such a case that the receiver is committing acts of waste, or is otherwise mismanaging the property, and that it is necessary for its preservation that some one else should take his place. The principle is laid down in Story's Equity Jurisprudence, sections 835 and 836. He says that it is not infrequent to ask for a receiver against a party who is rightfully in possession, or who is entitled to the distribution of the fund, or who has an interest in its due administration. In such cases, Courts of Equity will pay a just respect to such legal and equitable interests of the possessor of the fund, and will not withdraw it from him by the appointment of a receiver unless the facts averred and established by proof show that there has been an abuse, or a danger of abuse, on his part.

The Subordinate Judge, in making his enquiry under section 503, has all the powers conferred upon him that may be necessary for such enquiry. He may adjourn the case from time to time, and he may hear fresh evidence at any time before he makes the appointment. He may even abstain from appointing when he has received the necessary authority if he has good grounds for so doing; otherwise he might be appointing an unfit person when he has facts before him to show that the appointment would be most improper. Section 505 is not imperative. It merely enables the Subordinate Judge to appoint, when authorized by the District Judge to do so.

The Subordinate Judge in this instance may be wrong in saying that the property is under the management of the Collectorate. The correspondence which has been read to us seems to show that the Government is not desirous of interfering with the property. But the person now in charge of it

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was approved of by the Collector and by the members of the family, and no facts have been adduced except the cutting down of a few trees (which may be a proceeding causing no damage at all to the property,) in order to induce the Court to interfere. No proof has been given of the value of these trees, or that any actual damage has been done or is anticipated.

This appeal must, therefore, be rejected with costs.

[CIVIL APPELLATE JURISDICTION.]

*May 13th.* RAM SUKH BHUNJO AND OTHERS (DE- } APPELLANTS;  
No. 1314 of FENDANTS) . . . . . AND  
1879. BROHMOYI DAS (PLAINTIFF) . . . . . RESPONDENT.

*Limitation Act, XV of 1877—"Deposit"—Loan repayable on demand.*

The word "deposit" in the Limitation Act, XV of 1877, as distinguished from a loan, refers to cases where money is lodged with another under an express trust, or under circumstances from which a trust can be implied.

**A**PPEAL from a decision passed by the Subordinate Judge of East Burdwan reversing the decree of the Moonsiff of Kulna.

In this case the respondent, who was the plaintiff in the Court of first instance, sued for the recovery of Rs. 1,000, said to have been deposited by her in the Calcutta firm of Dinonath Sircar, under an agreement that it should be repayable on demand. The money was alleged to have been made over on the 15th Aughran 1268 to Dinonath himself, to be deposited in his Calcutta firm, it being an agreed that it should bear interest at 15 per cent.; that interest was duly paid to her at that rate up to 1271, and then from that time to Cheyt 1282 at the reduced rate of 12 per cent.

That considerable sums of money had been paid to the plaintiff during these years was admitted, and evidence was given to show that they were paid on account of interest.

The Moonsiff dismissed the suit, on the ground that the evidence of the deposit had not been satisfactorily proved.

The lower Appellate Court, however, considered that the evidence of the plaintiff as to the deposit, and as to the subsequent



of money by way of interest, was to be accepted as  
 thy, and he reversed the decision of the Moonsiff. In  
 urt the question, whether the transaction in question was  
 ated as a loan or a deposit, was also considered with  
 e to the further question as to whether the plaintiff's  
 barred by limitation. The Subordinate Judge held that  
 ansaction were a deposit then no question of limitation  
 ise, as limitation would then run from the date of the  
 and not from that of the deposit.

the judgment of the Subordinate Judge the defendants  
 to the High Court.

*Sreenath Dass*, and *Baboo Tarruck Nath Dutt*, for the  
 its.

*Chunder Madhub Ghose*, and *Baboo Saroda Prosunno*  
 the Respondent.

gments of the High Court (1) were as follows:—

*J.*:—

WHITE, J.

nly point upon which it is necessary for us to give judg-  
 whether the suit of the plaintiff, who is the respondent  
 s, is barred by limitation.

been found by the lower Appellate Court that in 1861  
 tiff deposited Rs. 1,000 with the defendant's father, who  
 ay upon it interest, which was originally fixed at 15 per  
 t was subsequently reduced to 12 per cent. per annum,  
 up to the close of the year 1282, corresponding with  
 e plaintiff regularly received her interest.

greement made at the time of the deposit was, that the  
 e repayable on demand.

date when this action was brought the law of limitation  
 was the Act of 1877, and by that law the period of  
 n in respect of a deposit to be repaid on demand runs  
 e date of demand, but in respect of a loan repayable on  
 from the date of the loan.

ower Appellate Court considers that the transaction was  
 , and that, as the demand was alleged to have been  
 ntly made, the plaintiff is not barred.

(1) WHITE and MACLEAN, J.J.

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DASI.*Judgment.*

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In my opinion the transaction, although called a deposit, was, in point of law, a loan, upon which interest was to run. I think that the word 'deposit' in the Limitation Act, as distinct from loan, points to cases where money is lodged with another under an express trust, or under circumstances from which a trust may be implied. In the present transaction there is nothing which distinguishes it from a loan, or invested the recipient of the money with the character of a trustee.

The defendants, who are the appellants before us, argue that, taking the transaction to be a loan, the plaintiff is barred. But the Limitation Act of 1877, section 20, gives a new period of limitation where interest on a debt has been paid before it has become barred, and that new period is to be computed from the time when the payment was made. The finding, therefore, of the lower Court that interest was paid upon the loan down to 1282, disposes of the objection.

No question arises here as to whether the debt was barred under the law of limitation which was in force prior to 1877, for as the loan was payable on demand, and no demand was made until 1283, and as the interest was regularly paid down to 1282, the debt would be alive whichever law of limitation is applied to it.

The appellants raise the further objection that the lower Appellate Court has not expressly found that a demand for payment was made as alleged by the plaintiff. I think that there is this omission in the judgment of the lower Court. It is there stated that, "as the demand is said to have been made in Bysack 1283," such and such results followed; but there is no finding that the demand in question was made. We do not think, however, that we ought to remand the case to supply this defect. The substantial defence of the appellants was a denial of the deposit or loan. No issue was framed by the first Court as to whether the alleged demand was made, nor does the present objection form one of the grounds in the memorandum of appeal.

The result, therefore, is that this appeal must be dismissed with costs.

MACLEAN, J. MACLEAN, J. :—

I concur in dismissing the appeal.

## [FULL BENCH.]

LUCHMUN DAS (PLAINTIFF) . . . . . APPELLANT ;

AND

GIRDHUR CHOWDHRY BY HIS MOTHER AND }  
GUARDIAN (DEFENDANT) . . . . . } RESPONDENT.

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Nos. 228, 279,  
288 and 289  
of 1878.

*Mitakshara joint family—Alienations of ancestral property by father—Legal necessity for alienation—Immoral purposes, Alienations by father for—Execution sale of property mortgaged by father—Notice—Adult sons—Minor sons—Mortgage of joint property—Antecedent debt—Karta—Parties to suit.*

In the case of a Mitakshara family consisting, of a father and a minor son, where the father (being the manager) has raised money by mortgaging certain ancestral family property, it not being proved on the one hand, that there was any legal necessity for his raising the money, nor, on the other, that the money was raised or expended for immoral purposes, or that the lender made any inquiry as to the purpose for which it was required, the lender cannot, in a suit against both father and son, enforce the mortgage itself upon which the money was raised ; but, the debt being an antecedent debt within the rulings of the Privy Council, he is entitled to a decree directing the debt to be raised out of the whole ancestral estate inclusive of the mortgaged property. On the father's death in such case, the minor son being an only son, the lender would be entitled to a similar decree against him.

If under the above circumstances the lender should have sued the father alone, and obtained a decree for payment and for sale of the mortgaged property, and at the sale should have bought the property himself, he cannot be considered as a *bonâ fide* purchaser for value, and is not entitled as against the infant son to the property, except to the extent of the father's interest, either during the life or after the death of the father.

If, in the case first stated, the son had been an adult at the time of the raising the money and the giving of the mortgage bond, the lender would have been entitled to a decree directing, as in that case, the debt to be raised out of the whole ancestral property.

In a Mitakshara joint family, consisting of two brothers and their sons, the former, being the managers, raised money by executing a zuripeshgi lease of specific family property, the lenders making no enquiry as to the necessity for the loan. Immediately thereafter the two brothers took a sub-lease at a rent of the same property from the zuripeshgidar,

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and continued in possession, the zuripeshgi and the sub-lease being merely a device by the two brothers to raise money and to continue in possession of the property. The rent not having been paid, a suit was brought by the zuripeshgidar, and in execution of a decree therein obtained the property was sold, the zuripeshgidar becoming the purchaser and obtaining possession.

*Held*, that it not being shown for what purpose the money was raised, the sons, if not made parties to the suit, would be entitled to recover their shares against the purchaser.

*Gridhari Lall vs. Kanto Lall, and Muddun Thakoor vs. Kanto Lall*, L. R., 1 I. A., 321; and *Ram Sahai vs. Sheo Pershad Singh*, 4 C. L. R., 226 (S. C.); (*Nomine*) *Suraj Bansi Koer*, L. L. R., 5, Cal., 148, and L. R. 6, I. A., 99, considered.

**REFERENCE** to a Full Bench submitted for the opinion of the Court by GARTH, C.J., and MITTER, J., on questions arising in Regular Appeals Nos. 228, 279, 288 and 289 of 1878.

In Regular Appeal No. 228 the plaintiff sued to recover Rs. 9,251-11-3, principal and interest, due under two bonds dated 2nd Anghran 1280 and 16th Kartick 1284 respectively, by the sale of 5 annas 6 gundas 2 cowries 2 krants of a certain Mouzah, the property of one Sridhur Chowdhry, who died leaving a minor son Girdhur Chowdhry.

The property mortgaged was admittedly ancestral.

The family was governed by Mitakshara law.

Girdhur Chowdhry was sued in this suit through his mother and guardian, Kamini Chowdhraim.

An issue was raised as to whether he was born at the time of the execution of the bonds sued upon, and decided by the Subordinate Judge in the affirmative.

The Subordinate Judge found that the debts secured by the bonds were contracted by Sridhur for his own personal and exclusive benefit, and that no necessity for the debts being contracted had been proved. He gave a decree for the amount claimed, such decree being declared to be recoverable exclusively from the share of the late Sridhur.

In Regular Appeal No. 279, the plaintiff Roy Chunder Rader Pershad Bahadoor sued to recover Rs. 22,046-14, the principal and interest due on three bonds, dated 7th September 1873,

22nd December 1874 and 4th October 1876 respectively, executed by one Mohun Chowdhry, a member of a joint Mitakshara Family. Under these bonds the joint family property was mortgaged.

Mohun Chowdhry and his only son, who was sued through his mother and guardian, were made defendants.

The father allowed judgment by default, but the son appeared and objected to the power of his father to charge the joint family property with the debt.

The Subordinate Judge found that no legal necessity had been shown for the loans to the father, and that the money borrowed was not on account of, or for the benefit of the joint family.

He accordingly passed a decree for the amount claimed, and directed that such decree should be satisfied from the share of the father only in the joint property.

Regular Appeals 288 and 289 were similar to each other. The plaintiffs in each were the same, viz., Bhairu Pershad and Lokini Pershad, for themselves and as guardians of their brothers; the sons of Modit Narain Singh by their guardians; the sons of Mode Narain; the wives of Modit and Mode Narain, and the widow of Odit Narain, their deceased brother.

The first suit was to recover possession of a 16 annas share in Mouzah Gungapur Pukria, by setting aside a sale and zurpeshgi lease. The property in question had been sold in execution of a decree for rent obtained by the defendant Nos. 3 and 4 against Modit Narain and Mode Narain, the sons of one Gouri Sunkur, deceased, who were made defendants.

The zurpeshgi which the plaintiff wished to set aside was dated 1275, and it appeared that a sub-lease had been granted a few days subsequent to the execution of the zurpeshgi to Modit Narain and Mode Narain, so that possession was allowed to remain with them.

It was said, however, that this interchange of documents, was for the purpose of a loan, and it appeared that a loan was actually made.

It was not proved for what purpose the loan was taken, nor

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was it shown that the money was applied for the benefit of the members of the family other than the actual borrowers.

That the family was still joint was admitted.

The Subordinate Judge passed a decree that the plaintiffs should recover possession of the property claimed, subject to the defendants Nos. 3 and 4, the purchasers at the auction sale being declared entitled upon partition to the shares of Modin Narain and Mode Narain in such property.

In Regular Appeal 289 the facts were, as already stated, similar—

On these appeals being heard by GARTH, C.J., and MITTER, J., certain questions arose which it was thought necessary to refer to a Full Bench.

The reference submitted to the Full Bench was in the following terms :—

In all these cases the question has arisen in different forms and under different circumstances—how far in the case of a joint Hindu family governed by Mitakshara law, an alienation of ancestral property by the father of the family is binding upon his sons.

Certain recent decisions of this Court, which are mentioned below, appear to throw some doubt upon the meaning of the rule laid down by the Privy Council,—first in the cases of *Gridhare Lall vs. Kantoo Lall*, and *Muddun Thakoor vs. Kantoo Lall*, L. R., 1 Indian Appeals, 321, and afterwards explained and confirmed in the case of *Ram Sahai vs. Sheo Pershad Sin*, 4 Cal. Law Reports, 226; (S. C.) *Suraj Bunsii Koer vs. Sh Persad Singh*, I. L. R., 5 Cal., 148.

These decisions seem also to be to some extent conflict *inter se* upon certain points, which it is necessary for us decide in these cases, and which, therefore, we think it right to refer to a Full Bench as follows :—

1. In the case of a Mitakshara family, consisting of a father and one minor son, where the father (being the manager) has raised money by hypothecating certain ancestral family property on mortgage bonds,—and it is not proved, on the one hand, that there was any legal necessity for his raising the money, nor on the other that the money was raised or expended for immoral purposes, or that the lender made any inquiry as to the

for which it was required, can the lender, (the mortgagee) enforce, by suit against the father and the son, the payment of his money by sale of the property during the father's lifetime?

2. Can he do so, under similar circumstances, by suit against the minor after the father's death?

3. If the mortgagee, under such circumstances, brings a suit against the father alone, obtains a decree for payment and for sale of the property, and at the sale buys the property himself, is he entitled, as a *bonâ fide* purchaser for value, to hold the property as against the infant son, either during the life or after the death of the father?

4. Would it make any difference to the right of the mortgagee in any of the above cases, if the son at the time of the raising the money, and the giving of the bond, were an adult instead of a minor?

5. Would it make any difference if the money were borrowed partly to pay an antecedent debt of the father, and partly for some other unexplained purpose?

6. Would it make any difference, if in the sale under the decree, the right, title and interest of the father in the property was sold, instead of the entire property?

7. In the case of a Mitakshara joint family, consisting of two brothers and their sons, the former being the managers, raise money by executing a zurpeshgi lease of specific family property, the lenders making no enquiry as to the necessity for the loan.

Immediately after this, the two brothers take a sub-lease at a rent of the same property from the zurpeshgidar, and continue in possession. The rent not being paid a suit is brought by the zurpeshgidar, and a decree is obtained for it against the two brothers; and in execution of the decree the same property is sold, and the zurpeshgidar becomes the purchaser and obtains possession. We find, as a fact, that the zurpeshgi and the sub-lease were merely a device by the two brothers to raise money, and to continue in possession of the property; but it is not shown by either side for what purpose the money was raised. Are the sons entitled to recover back the property or any and what portion or share of it from the purchaser?

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The following are the recent decisions of this Court above referred to :—

*Adurmoni Deyi vs. Chowdhry Sib Narain Kwr*, (I. L. R. 3 Cal. 1.).

*Gunga Pershad vs. Sheo Dyal Sing*, 5 C. L. R., 224.

*Genesh Pandey vs. Dabee Doyal Singh* 5 C. L. R., 36.

*Pursidh Narain Singh vs. Lalla Hanuman Sahoy*, 5 C. L. R. 576.

In Appeal No. 279 of 1878—

Baboo Chunder Madhub Ghose, Baboo Unnodapersad Banerjee, and Baboo Mutty Loll Mookerjee, for Appellant.

Baboo Anund Gopal Palit, and Baboo Taruck Nath Palit, for Respondent.

In Appeal No. 228 of 1878—

Baboo Chunder Madhub Ghose, and Baboo Abinash Chunder Banerjee, for Appellant.

No one appeared for Respondent.

In Appeal No. 288 of 1878—

Baboo Chunder Madhub Ghose, and Mr. C. Gregory, for Appellant.

H. Bell, Baboo Kally Mohun Dass, and Baboo Jogesh Chunder Dey, for Respondent.

In Appeal No. 289 of 1878—

Branson, Mr. Sandel, and Baboo Mohesh Chunder Chowdhry, for Appellant.

H. Bell, Baboo Kally Mohun Dass, and Baboo Jogesh Chunder Dey, for Respondent.

Baboo Chunder Madhub Ghose.—I propose to consider the Privy Council cases referred to in the order of reference, and the more recent Privy Council case of *Bissessur Lall Sahoo vs. Luchmessur Singh*, 5 C. L. R., 477, first, and then the views taken by the Judges here.

There are two classes of cases to be considered—first, where the mortgagee under a mortgage from the father alone, seeks to enforce his mortgage against both father and son; and second,



where a decree has been obtained against the father on a mortgage executed by him only, and in execution of such decree the purchaser has been put into possession, and it is sought to set aside the sale, the question arising in the latter case whether the whole property had passed.

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The true question involved in both these classes of cases is whether under the Hindu Law the son is liable for his father's debts; for if he is so liable, he cannot free himself from the liability, nor set aside an alienation of the ancestral property made by the father to defray his debts, without proving that the debts were incurred for immoral purposes.

In *Gridharee Lall's* case, L. R., I. A., 321, the Privy Council having laid down that a son was bound to pay his father's debts, and that the ancestral property in which by his birth he acquires an interest, was liable for their payment, (see p. 331,) examine the debt to see whether the sons were exempted by reason of the debt having been contracted for immoral purposes, or otherwise. After finding that the debts were not for immoral purposes, what the Privy Council say in p. 332 as to the necessity to incur the debt, was irrespective of the ground upon which they considered the plaintiff's case failed. They held that if a father sells a property for antecedent debts, the sale cannot be questioned except upon the ground that the debts were immoral.

[PONTIFEX, J.—The Privy Council do not go into the question as to whether the particular property sold was liable.]

In *Deendyal Lall vs. Jugdeep Narain Singh*, 1 C. L. R., (S. C.) L. R., 4 I. A., 247, the right, title and interest of the father only were attached and sold.

[GARTH, C.J.—Suppose there was a legal necessity to sell, I take it that the Kurta would be the proper person to determine what property should be sold.]

Yes. Where the sons were minors no difficulty would occur; where the sons were adults, the father as Kurta would have a discretionary power.

[PONTIFEX, J.—How do you get over Mitakshara, Chap. I, section I, verse 29, where it seems to say the father has no such power?]

That verse does not contemplate the question of the liability of a son, as a son born to the father, to pay his father's debts, nor

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the question whether or not, if the father sells for antecedent debts, the sale could be questioned. There is a distinction between a sale for antecedent debts, and a sale where no such debt exists. In the latter case, the sale would not perhaps be binding upon the son.

According to the case of *Muddun Thakoor vs. Kantoo Lall*, L. R. 1 I. A., 333, a third person purchasing ancestral Mitakshara property *bona fide*, at an execution sale, need not look behind the decree, and the interest both of the father and son would pass under such a sale.

The case of *Hunnoomanpersad Pandey*, 6 M. I. A., 393, is referred to by the Judges of this Court as showing that the Privy Council did not intend to lay down the proposition, that unless a son shows that the debt of his father was of an immoral character he is bound by that debt. I refer to the case as showing that it was necessary in *Gridharee Lall's* case for the Privy Council to say what they did at p. 331, as to the liability of the son to pay his father's debts, and as to the freedom of the son in certain cases only from liability to pay his father's debts. The Privy Council adopted the principle of the case of *Mussamut Junnuk Kishoree Koonwar vs. Rughoonundus Singh*, S. D. A. for 1861, p. 220, but they went further and said the rule applied, not only in case of execution sales, but also in case of private alienations. Therefore, the Privy Council meant to lay down that the property in the hands of the son would be liable for the debts of the father, unless it could be shown that such debts were immoral.

The father, when he contracts debts, or when he sells ancestral property to pay off such debts, must be taken as representing the whole family. The presumption in all such cases is that the father Acts for the best interests of the family. In the case of *Bissessar Lall Sahoo vs. Luchmessur Singh*, 5 C. L. R., 477, the Privy Council take the view that the suit which was against the father, was not against him in his individual capacity, and that the decree must, therefore, be taken as binding against the whole family. Their Lordships say that the lease in respect of which the debt was incurred was taken by the defendant, not on his own account, but on behalf of the family, and that the debt must be assumed to be a family debt.

[PONTIFEX, J.—That view seems to be contrary to their decision in *Deendyal's* case, 1 C. L. R., 49 (S. C.) L. R., 4 I. A., 247.]

[MITTER, J.—The father as Kurta represents the family, not the estate.]

[PONTIFEX, J.—I cannot understand your suing the Kurta alone when there are others capable of being sued along with him. Minors, it seems, should be sued by their guardians.]

In *Muddun Thakoor's* case the decree against the father was taken to bind the whole property.

[PONTIFEX, J.—That was an *ex-parte* case, but although that may be no answer to the decision, we are now to be guided by the Civil Procedure Code which seems to make it imperative to add all parties interested.]

In *Ram Sahai vs. Sheo Prosad Singh*, 4 C. L. R., 226 (S. C.) L. R., 6 I. A., 99, which was fully argued, the Privy Council considered the effect and meaning of *Greedhari Loll* and of *Muddun Thakoor vs. Kantoo Lall*, and from these decisions I say that it follows that a sale by the father is good, when it is for antecedent debts, and it cannot be questioned except upon proof that the debts were immoral.

[PONTIFEX, J.—But suppose the sale were not for debt, (see *Mitakshara*, chapter I, section I, verse 27,) your argument would do away with the principle of the joint family, for the father may borrow money; he may then sell the estate to pay that money, and thus be enabled to treat it as movable property and apply it to what purposes he pleases.]

That might seem to be anomalous.

[MITTER, J.—Verse 27 deals not only with ancestral, but also with other property, and says that the consent of the sons is necessary.]

But there are other passages on partition in the *Mitakshara* according to which the father may deal as he pleases with his required property.

[MITTER, J.—Section 5 of chapter I, lays down that he cannot deal with land.]

But verse 10 of that section goes on to say the father has a dominant interest in other than ancestral property.

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[MITTER, J.—Throughout verses 7, 8, 9 and 10 the original word for estate is a word meaning chattels.]

I shall now consider the effects of the Privy Council decisions upon the questions referred to the Full Bench.

The only difference between the facts involving the first question and those in the Privy Council cases is, that here the creditor, the mortgagee, under a bond executed by the father only, seeks to enforce his lien against both father and son, whereas in the cases of *Muddun Thakoor* and *Ram Sahai*, the property had been sold in execution of decrees against the father and him alone. [The case of *Adaram Sitaram vs. Ranu Panduji*, 11 Bom. H. C. R., 76, was referred to.]

[GARTH, C. J.—I think there are two points of difference. In the case involving the first question it does appear that the debt was an antecedent debt. Moreover, the property has not passed out of the family; there is only a mortgage which the creditor is seeking to enforce. Then does the same rule apply against the sons as where the property has actually passed out of the family under a decree or sale?]

There is no difference in principle, I submit, between the case where the father executes a mortgage and then sells his property in order to pay it off, and where there has been a mortgage and the creditor seeks to enforce his lien.

The son here has been made a party, and I submit that the first question should be answered in the affirmative. The answer to the second question would follow the first.

The third question, I submit, should be answered by reference to *Muddun Thakoor's* case. Here there was a mortgage and a decree for sale of the property. [MITTER, J.—There is this distinction, that in *Muddun Thakoor's* case the purchaser was a stranger.] *Bissessur Lall's* case also favours my contention.

As to the fourth question there may be some difficulty by reason of verse 29 of section I, Chapter I of the *Mitakshara*.

[GARTH, C. J.—But the proposition which the Privy Council have laid down in *Ram Sahai's* case at p. 238 of 4 C. L. R., is irrespective of the question of whether the sons are adults or minors. (See p. 233).]

[**PONTREX, J.**—The Privy Council, however, have not had a case of an adult before them, and we have to consider *Mitakshara*, Chapter I, section 1, verse, 27 28 and 29.]

These verses may seem to be against me, but it appears from the view taken by the Privy Council that they should be read subject to the qualification of the obligation of a son, whether adult or minor, to pay his father's debts, an obligation which attaches not only after the death, but in the lifetime of the father. If there be property wherewith to pay the father's debts, that property must be followed. Besides there is a *prima facie* case in favor of debts incurred by the father being for the benefit of the family.

It is the nature of the debt contracted by the father, and not the nature of the property, which is the test of the right to follow such property for satisfaction of such debt—*Badree Lall vs. Kantee Lall*, 23 W. R., 260. In that case, which was one of the earliest cases after *Kantoo Lall's* case, the execution proceedings were against the father who was alive. See also *Mussamut Sham Soonder Kooer vs. Mussamut Jumna Kooer*, 25 W. R., 148, and *Muddun Gopal Lall vs. Mussamut Gourun Butty*, 20 W. R., 365. In these cases the doctrine for which I have been contending is distinctly recognised by the Courts here, viz, that a son is bound, by a sale made for payment of debts of his father, or by a mortgage when a mortgage has been given, to secure such debts.

After *Deendyal's* case there was some diversity of opinion as to what actually passed under a sale in execution of a decree against the father. But now *Ram Sahai's* case seems to have put the question at rest.

The answer to the fifth question would fall within the principle of that case.

**Branson.**—My case (Appeal No. 289) is covered by questions 3 and 4, and I submit these question should be answered in the affirmative.

The decisions of the Privy Council have made great inroads in the *Mitakshara*. That a father may alienate his share of family property without the consent of his co-sharers,

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is entirely against the doctrine of the Mitashara as laid down in chapter I, section 1, verses 28 and 29.

In support of my contention there is a series of cases: In *Gunga Narain vs. Sheo Dyal Singh*, 5 C. L. R., 224, the judgment of the Privy Council in *Ram Sahai's* case is discussed and its effect taken to be, that an alienation by a Mitakshara father of a joint family property, to pay off an antecedent debt, is valid against the sons, unless they show the debt was contracted for immoral purposes.

[*Ram Sahai's* case and *Ruder Perakash Misser vs. Hurdai Narain Sahu*, 5 C. L. R., 112 were also referred to and discussed.]

*II. Bell.*—All the questions raised by the reference may be considered with reference to two points, viz., (1) as to the extent of the liability of a son in a Mitakshara family to pay his father's debts, and (2) whether, assuming the liability, the sons can be bound by a decree against the father only, in a suit to which he (the son) was not a party.

Now no son is liable for the debt by his father during the life-time of the latter. It has been argued from *Ram Sahai's* case, 4 C. L. R., (P. C.) 226, L. R., 6 I. A., 99, that a father has an absolute power of alienation. But this is directly opposed to the Mitakshara, Chap. I, section 1, verses 27, 28 and 29.

Section 27 says the father is "subject to the control of his sons in regard to the immoveable estate, whether required by himself or inherited from his father or other predecessor." How then can he alienate without the consent of his sons?

In *Ram Sahai's* case the question of the extent of a son's liability for his father's debts was not considered. At p. 241, 4 C. L. R., it is said: "The question remains whether they are entitled to any and what relief as regards the father's share in this suit. It seems clear on the authorities that if the debt had been a mere bond debt, not binding upon the sons by virtue of their liability to pay their father's debts, and no proceedings had been taken to enforce it during the father's lifetime, his interest in the property would have survived on his death to his sons. So that it could not afterwards be reached by the creditor

in their hands \* \* \* \*. Their Lordships are of opinion that it is not necessary to determine that vexed question, which their former decisions have hitherto left open."

Now, if the property in that case had not been attached, the sons would have taken the property freed from the debt.

*Ram Sahai's* case therefore cuts down rather than extends *Muddun Thakoor's* case, for the purchaser is declared entitled merely to the father's share in the estate. Cf., the remarks of PEACOCK, C.J., in the case of *Sadabart Prosad Sahu vs. Foolbash Koer*, 3 B. L. R. (F. B), p. 35: "You are seizing the interest which has passed to the survivors by survivorship. \* \* \*"

The Privy Council cases were considered by JACKSON and WHITE J.J., in *Bheknarain Singh vs. Januk Singh*, I. L. R., 2 Cal. 438; and again by AINSLIE and BROUGHTON, J.J., in the case of *Gunesh Pandey vs. Dabee Doyal Singh*, 5 C. L. R., 36.

The first part of the judgment of the Privy Council in *Ram Sahai's* case is extra-judicial, for, it being held that the debt there was for immoral purposes, there was no necessity for the consideration of the questions discussed.

[MITTER, J.—It is not extra-judicial. The Privy Council first lay down the principles upon which they mean to act, and then they apply them.]

[*Gunga Persad vs. Sheo Dyal Singh*, 5 C. L. R., 224, was also quoted.]

The obligation of sons to pay their fathers' debts is imposed upon them merely to secure the salvation of the souls of the latter. See Menu, Chap. III., section 2. Now from this and other passages it would seem that the liability attaches only on the death of the father. See 1 Colebrooke, Chap. V., para CLXX. Further, the son is only bound to the amount of assets. See 1 Colebrooke, p. 278, para. CLXXVII, and p. 291, para. CLXXXVIII. According to para. CLXXXVII, no minor son is liable during minority to pay his father's debt. As to liabilities of sons, see also WEST and BÜHLER, Hindu Law, p. 340; 2 Strange, Hindu Law, p. 274.

The Privy Council have not discussed, nor have they laid down any rule as to the extent of the liability of the son.

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[GARTH, C.J.—In *Ram Sahai's* case the question was, whether the son's share as well as the father's was liable for the debt.]

If the proposition on p.p. 100, 101, in *Ram Sahai's* case, L. R., 6 L. A. is deduced from *Muddun Thakoor's* case the word "sons" at the top of the latter page must mean "minor sons."

*Deendyal's* case further lays it down that sons cannot be bound unless made parties to the suit. The case of *Bissessar Singh vs. Lucknessur Singh* does not conflict with *Deendyal Lal's* case, the question being whether the property could be attached without making a younger son a party.

The case of *Sadabart Prosad Sahu vs. Foolbush Koer*, 3 B. L. R., 51, lays down that assuming that sons are liable to pay their fathers' debts, they must be made parties to the suit; see p. 35.

The opinion of the Full Bench (1) was as follows :—

Having regard to the law, as laid down by the Privy Council in the cases mentioned in the reference, we think that the questions referred to us should be answered as follows :—

1. The mortgage itself, upon which the money was raised, could not be enforced; but the debt so contracted by the father, being itself an antecedent debt within the rulings of the Privy Council, and the son being a party to the suit, the mortgagee, notwithstanding the form of the proceedings, would be entitled to a decree directing the debt to be raised out of the whole ancestral estate, inclusive of the mortgaged property.

2. Assuming the minor to be the only son, the mortgagee would be entitled to a similar decree against him after the father's death.

3. We think that under such circumstances the mortgagee could not be considered as a *bond fide* purchaser for value, and would not be entitled to the property except to the extent of the father's interest as against the infant son.

4. Assuming the adult son to be a party to the suit, the mortgagee would be entitled to a decree, similar to that mentioned in

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the answer to the first question, directing the debt to be raised out of the whole ancestral estate.

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5. In the view which we take of the case, the whole of the money borrowed would be an antecedent debt.

6. We consider it unnecessary to answer this question.

7. The sons not being made parties to the suit they would be entitled to recover their shares as against the purchaser. If they had been made parties, they would have had apparently a good defence to the suit upon the merits.

[CIVIL APPELLATE JURISDICTION.]

DURGA PERSHAD (PLAINTIFF) . . . . . APPELLANT ;

June 7th.

AND

ASU JOLAHA (DEFENDANT) . . . . . RESPONDENT.

No. 198 of  
1879.

*Act XI of 1865, section 6—Jurisdiction of Court of Small Causes—Personal Injury—Damages.*

It is only in cases where no actual pecuniary damage has been sustained, as in case of suits for defamation, or for infringement of rights, that the jurisdiction of Courts of Small Causes is excluded by the provisions of section 6 of Act XI of 1865.

**A**PPEAL from a decision passed by the Subordinate Judge of Patna, reversing the decree of the Moonsiff of that district.

This was a suit instituted in the Court of the Moonsiff of Patna, to recover the sum of Rs. 104-15 on account of costs incurred in certain proceedings which the plaintiff alleged had been maliciously, and without reasonable or probable cause, instituted against him in the Criminal Court; and a further sum of Rs. 125, as damages for defamation of character.

The Moonsiff gave the plaintiff a decree for Rs. 104 for costs, and Rs. 62-8 as damages for defamation.

On appeal the Subordinate Judge reversed the Moonsiff's decision on the ground that the suit was one cognizable by the Small Cause Court and not by the ordinary Civil Court.

A second appeal was thereupon preferred by the plaintiff.

Baboo Abinash Chunder Banerjee, for the Appellant.

No one appeared for the Respondent.

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GARTH, C.J.

The judgment of the High Court (1), which was follows, was delivered by

GARTH, C.J. :—

This case seems to us very clear.

The suit is brought to recover damages for a malicious prosecution; and the plaintiff says, that besides the actual costs to which he has been put by the malicious proceedings, and which amount to Rs. 104-15, he is also entitled to an additional sum for damage to his reputation.

The question is whether this is a case which may be tried in the Small Cause Court.

Section 6 of Act XI of 1865 says, first, that a suit may be brought in the Small Cause Court for damages; but that "no action shall lie in such Court for damages on account of an alleged personal injury, unless actual pecuniary damage has resulted from the injury." That means that if actual pecuniary damage has resulted from the injury, then the suit may be brought in the Small Cause Court.

Now, in this case there is no doubt that actual pecuniary damage has resulted from the injury, because the plaintiff claims a sum of Rs. 104-15, which he says he has had to pay for costs. It is true he claims something more; he claims an undefined sum for loss of character. But we think that, looking both to the language and the meaning of section 6, this suit should have been brought in the Small Cause Court. It is only in cases *where no actual damage at all has been sustained*, such as suits for defamation, or for infringement of rights, that the jurisdiction of the Small Cause Court is excluded. These are very frequently cases of great difficulty, and the question of damage itself, where no actual loss has been sustained, is often a matter of much nicety.

If the exception in the Act applied to such cases as the present, where, besides his actual loss, the plaintiff tries to recover something additional for loss of character, an immense number of suits would be excluded from the Small Cause Court, which clearly were intended to be tried there; as for instance,

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where a man brings a suit against his neighbour for pulling down a wall, and besides the cost of rebuilding the wall, which would be the ordinary damage in such a case, claims something indefinite on account of circumstances of aggravation. It would obviously be easy for a plaintiff to invent some indefinite claim in every such case, for the purpose of evading the provisions of section 6.

We think, therefore, that the Judge in the Court below was quite right in holding that this case was cognizable by the Small Cause Court, and we dismiss the appeal, but without costs, as the respondents do not appear.

[CIVIL APPELLATE JURISDICTION]

NURSINGH DOYAL (DECREE-HOLDER) . . APPELLANT;

AND

HURRYHUR SAHA (JUDGMENT-DEBTOR) . . RESPONDENT.

May 12th.

No. 279 of  
1879.

*Limitation—Act XV of 1877, sections 2, 11 and 28—Act IX of 1871 sections 12 and 29—Debt—Remedy—Contract Act, IX of 1872, section 60—Decree, Questions to be determined by Court executing—Civil Procedure Code Act (X of 1877), sections 242 and 244 (c.)*

Neither the Limitation Act of 1871, nor Act XV of 1877, extinguishes a debt. These acts only bar the remedy.

The words "revive any right to sue," in section 2 of Act XV of 1877, should have their widest signification, and be taken to include any application invoking the aid of the Court for the purpose of satisfying a demand.

According to the provisions of sections 242 and 244 (c) of the Civil Procedure Code, Act X of 1877, and the Full Bench case of *Bisseshur Mullick vs. Maharajah Mahatab Chand Bahadoor*, 10 W. R. (F.B.) 8, a Court to which a decree has been transferred for execution has jurisdiction to determine whether or not such decree is barred by limitation.

*Lootfoolah vs. Kerut Chand*, 21 W. R., 330, considered.

*Nocoor Chunder Bose vs. Kally Coomar Bose*, I. L. R. 1 Cal., 338, explained.

The conclusion in the case of *Shumbu Nath Shaha vs. Guru Churn, Lahary*, 6 C. L. R., approved.

APPEAL from an order passed by the District Judge of Gya.  
This was an application by the decree-holder for execution of

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a decree which was passed on the 27th May 1874. The first application, which had been made for execution, was on the 23rd June 1874. The property of the judgment-debtor was then attached and sold on the 10th November 1876, and the case was struck off on the 27th January 1877. On the 25th September 1877, more than three years after the date of the last application, the decree-holder applied that the case should be transferred from the Court of Hazaribagh in which proceedings had been already taken, to the Court of the District Judge of Gya, and an order to that effect was passed on the 24th September 1878. In that Court the decree-holder having failed to show that any application was made during the course of three years to enforce or keep in force the decree, the application of 25th September 1877 was held to be barred by limitation, and the case was ordered to be struck off.

From that order the decree-holder appealed.

Baboo *Aukhil Chunder Sen*, for Appellant.

Baboo *Nil Madhub Sen* and Baboo *Ram Churn Mitter*, for Respondent.

Baboo *Aukhil Chunder Sen*.—According to section 8 of the Limitation Act, XV of 1877, "suit," as there defined, does not include an application. The words "revive any right to sue" in section 2 must accordingly be confined to suits. Under the provisions of the latter section, therefore, the decree may be taken to be alive, and the proceedings in execution ought to be allowed to go on.

[PONTIFEX, J.—Does not the question here depend on the words "right to sue"? The word "suit" is interpreted, but "sue" is not.]

I submit the "right to sue" must mean a right to bring a suit to enforce some right or obtain some relief.

[The cases of *Rajah Nilmony Singh vs. Nilcomul Tuppadar*, 25 W. R., 546; *Raghoo Nath Doss vs. Ramee Shermonee*, 21 W. R., 10; and *Eshan Chunder Bose vs. Prannath Nag*, 22 W. R., 512, were referred to and commented on; and *Nocoôr Chunder Bose vs. Kelly Coomar Ghose*, I. L. R., 1 Cal., 328.]

Again, I contend that the Court of Gya had no jurisdiction to try the question of limitation. See section 244 of the Civil Procedure Code, Act X of 1877. The case should have been sent back to Hazaribagh for the determination of that question—*Lootfoolah vs. Keerut Chund*, 21 W. R., 830.

*Baboo Nil Madhub Sen.*—To the objection to the jurisdiction of the Gya Court raised by the other side, the Full Bench case of *Skumbhu Nath Shaha vs. Guru Churn Lahiry*, 10 W. R., 8, affords an answer. There it was laid down that the Court to which a decree was transferred for, had full jurisdiction to enquire whether the decree was barred or not. Under section 244, clause (c) of the Civil Procedure Code, the Court executing the decree is fully empowered to enquire into the question of limitation.

As to the other point raised in this appeal, in the case of *Skumbhu Nath Shaha vs. Guru Churn Lahiry*, 6 O. L. R., 487, MORRIS and PRINSEP, J.J., held that the remedy under a decree once barred under the former Limitation Act was not revived by the new Limitation Act of 1877. The learned Judges there seem to have considered that the words of section 2 might be extended to applications for execution of decrees.

In the case of *Vencatachella Mudali vs. T. Sashagerry Rau*, 7 Mad. H. C. B., 283, it was held that the Limitation Act of 1871 did not give a new period of limitation on a bond which was barred by the old Limitation Act before the new Act came in force.

*Baboo Aukhil Chunder Sen*, in reply.

The judgment of the High Court (1), which was as follows, was delivered by

PONTIFEX, J.:—

PONTIFEX, J.

We are of opinion that neither the Limitation Act of 1871, nor that of 1877 extinguishes a debt. These acts only bar or discharge the remedy. This we think is clear from the language of the Acts, and particularly from sections 12 and 29 of the Act of 1871, and sections 11 and 28 of the Act of 1877.

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The difference between these Acts and the English Limitation law is that in India Limitation need not be set up as a defence, (section 4 of the Act of 1871 and section 4 of the Act of 1877,) while in England the defendant must expressly claim the operation of the statute. Section 60 of the Contract Act, which Act was passed after the Limitation Act of 1871, also shews that the debt is not extinguished, but may be effectively insisted on for certain purposes. So likewise if the creditor had a lien on goods of his debtor for a general account, he would be entitled to hold the goods for a debt, the recovery of which was barred by the Limitation Act. And probably it would be held that an executor would be allowed to retain, out of a legacy, a debt owing by the legatee to the testator, though its recovery was barred by the Act. But a difficult question arises by reason of the passing and repeal of so many Limitation Acts in India, viz., whether in consequence of the repeal of a former Act, a remedy barred or discharged by it, revives, subject of course to the provisions in the Repealing Act.

With respect to the institution of suits, section 2 of the Limitation Act of 1877 is clear. It states that "nothing in the Act contained shall be deemed to revive any right to sue, barred under any enactment thereby repealed." The Act of 1871 was not by any means so clear. In the case reported in I. L. R., 1 Cal., 328—*Nocoor Chunder Bose vs. Kally Coomar Bose*—I decided that the remedy barred by the Act of 1859 was not revived by the repealing Act of 1871. The reasons for my decision were, that while section 1 of the Act of 1871 declared that the Act was to come in force on the 1st day of July 1871, yet at the same time it also expressly enacted that section 2, which repealed the Act of 1859, was not to come into force before the 1st of April 1873. Between the 1st of July 1871 and the 1st of April 1873, therefore, the Act of 1859 continued in force, and during that period, by that express provision of the Act of 1871, no suit could lie for the debt which was sued for in the case of *Nocoor Chunder Bose vs. Kally Coomar Bose*, I. L. R., 1 Cal., 328. It seemed to me preposterous to impute to the Legislature an intention of giving validity to a suit instituted after the 1st of April 1873, which they had at the same time, and by the same section, expressly

provided should, by the continuance of the Act of 1859, be barred between the 1st of July 1871 and the 1st April 1873.

But, as I have said, that difficulty is removed by the clear language of section 2 of the Act of 1877 so far as respects the institution of suits. Unfortunately, that language is not so clear as to the conduct of proceedings in a suit after its institution.

In the case before us the judgment-creditor sought to enforce execution of a decree passed on the 27th May 1874. The question is whether, assuming execution of such decree was barred by Article 167, Schedule II of the Act of 1871, the judgment-creditor can take advantage of the more liberal provisions (as in this case) of Article 179 of Schedule 2 of the Act of 1877. The Court below has decided that he cannot, and against that decision the judgment-creditor has appealed to us. His argument is, that the Act of 1877 having, in its third section, defined the word "suit" so as not to include an appeal or an application, therefore, the words "to revive any right to sue" appearing in the second section must also be confined to the institution of suits as opposed to the conduct of proceedings in a suit after its institution.

No doubt there is some foundation for this argument from the imperfect language used in the Act, but we think that section 2 at least indicates the policy of the Act; and in our opinion the words "revive any right to sue," used in that section, should have their widest signification, which we think would include any application invoking the aid of the Court for the purpose of satisfying a demand. It is indeed a by-no-means uncommon form of speech to say "sue out execution." We, therefore, think the words of the Act warrant the decision of the lower Court.

We have been referred to a case decided by Justices MORRIS and PRINSEP on the 29th April of this year—*Shumbhu Nath Shaha vs. Guru Churn Lahiry*, (reported ante p. 437) in which they arrive at the same conclusion, on the broad ground that a contrary decision, unless required by the express language of the Act, would be "opposed to the principles of a law of limitation." We are of course bound by that case.

But the applicant urges that the Court at Gya, to which is judgment had been transferred from Hazaribagh, was not

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the Court which should have tried this question of limitation; and that his case ought to have been sent back to Hamaribagh for an adjudication on that question; and he has referred us to the case of *Lootfoolah vs. Keerut Chund*, 21 W. R., 330. That case, however, is opposed to the Full Bench case reported in the 10 W. R., Full Bench Rulings, p. 8—*Shumbhu Nath Shaha vs. Guru Churn Lahiry*, and we think that sections 242 and 244 (c) of the new Procedure Code support the ruling of the Full Bench.

We, therefore, dismiss this appeal, but the position of the appellant being that of an unsatisfied creditor, we dismiss it without costs.

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[CIVIL APPELLATE JURISDICTION.]

May 21st.

No. 1405 of  
1879.

CHANDMONI DASI (DEPENDANT) . . . APPELLANT;

AND

LOKENATH CHATTERJI (PLAINTIFF) . . . RESPONDENT.

*Act VIII (B.C.) of 1869, section 27—Suit for declaration of liability to pay less rent than fixed by pottah—Equitable Relief—Limitation—Abatement of rent.*

A suit by a tenant against his original lessors for a declaration that he is not liable to pay them the whole rent payable under his pottah in consequence of a third person having, subsequently to the grant of such pottah, by suit established a right to a share of the rent, is not a suit for abatement under Act VIII (B.C.) of 1869, and therefore not subject to the rule of limitation prescribed by section 27 of that Act.

Where, under such circumstances, the tenant is holding more land than is covered by his pottah, it is not necessary that his landlords, if desirous of enhancing the rent, should be referred to a separate suit for that purpose. The suit of the tenant being for equitable relief, the claim of the landlords must be taken into consideration in determining what relief the plaintiff is entitled to obtain.

**A**PPEAL from a decision passed by the District Judge of Jessore, dated the 17th April, reversing the decree of the Moonsiff of Culna.



The plaintiff in the case sued for a declaration that he was bound to pay his lessors Anundmoyi and Hur Sundari, or their representatives, only one-half of the rent agreed upon for the lands held by him under a pottah, in consequence of a third person having, since the commencement of his holding, by suit against him and his lessors, established a right to a half share of the rent of the same lands.

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Judgment.

The Moonsiff treated the suit as one for abatement of rent, and held that it was barred under section 27 of the Rent Act VIII (B.C.) of 1869.

The lower Appellate Court reversed this decision, and declared the plaintiff liable to pay the defendants half of the rent payable under his pottah.

The principal defendant appealed to the High Court.

Baboo Sreenath Dass, and Baboo Troyluckyo Nath Mitter, for the Appellant.

Baboo Rash Behary Ghose, for the Respondent.

The judgment of the Court (1) was as follows :—

The plaintiff, respondent in this appeal, brought the suit to obtain a declaration that he was liable to pay to defendant No. 1, the appellant before us, a rental of only 89-10-5-1-1 in respect of her share of the land held by plaintiff as a tenant.

He brought a similar suit (*vide* Appeal No. 1587) in respect of the share of Subunkuri Dasee, a co-proprietor of the land held by him. The suits were in fact for a reduction of the rent payable to these two ladies, on the ground that after the plaintiff had become the tenant of their predecessors a third party, Rajah Baroda Kant Roy, who was made a defendant in these suits, had established his title to one-half of the land, and had obtained his share of the rent accordingly. The plaint sets out that in 1876 the present appellant sued plaintiff for rent, and obtained a decree notwithstanding the claim made by the latter for a remission of one-half. On appeal to the Subordinate Judge plaintiff was told he might bring a separate suit for remission. Hence the present suit. The suit of Rajah Baroda Kant Roy was finally disposed of in February 1873, and the decree then obtained

(1) JACKSON and TOTTENHAM, J.J.

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by him is the ground of the present suit. The suit, instituted in 1878, was held by the First Court to be barred by limitation under section 27 of the Rent Act, which prescribes one year as the period of limitation in suits for abatement of rent. The Moonsiff was also of opinion that by reason of the area of the land in plaintiff's possession being considerably greater than that for which the rent was originally fixed, he was not damaged by the misrepresentation of the lessors as to the extent of their interest. He, therefore, dismissed the suit. The lower Appellate Court reversed this judgment both as to the question of limitation and as to the merits of the case. It seemed to that Court clear that the suit was not barred, as rent is a recurring claim; and it seemed equally clear that plaintiff was liable to his lessors for only half the rent, as by a decree of Court another person has established a claim to one-half. With reference to the Moonsiff's observations regarding the area of the land being considerably larger than was described, when plaintiff became the tenant of it, the District Judge says: "If plaintiff holds more than was estimated, this might give his landlord a claim to enhance his rent, but they have made no such claim."

The defendants have preferred a second appeal to this Court, and contend that the lower Appellate Court is on both points decided by it wrong in law.

As to the first point we agree with that Court in the opinion that the suit is not barred by limitation, though we cannot adopt the reason given by the Judge for that opinion. The true reason for it appears to us to be that the present suit does not come under the Rent Act (VIII. B. C., of 1869) at all, and that therefore section 27 of that Act does not apply to it. It was held by COUCH, C.J., and the late Mr. Justice GLOVER, in the case of *Aitchison vs. Rajah Nilmonee Singh*, 20 W. R., 347, that the section in question applies only to such suits for abatement as are mentioned and provided for in section 19, i.e., suits by ryots having a right of occupancy on certain grounds specified in the section. It is not necessary for us now to say whether we would go the whole length of that decision, but we certainly so far concur in it as to hold that this case does not come under the section in question.

It is not in fact a suit for abatement of the rent payable for the plaintiff's land. He does not seek to reduce the sum assessed upon it; but to have it declared that inasmuch as a third party has established his right to one-half of that sum, he is no longer liable to pay the whole amount to the defendants. The plaintiff sues, therefore, for equitable relief from a contract which, by reason of the decree obtained against him and his lessors by Rajah Boroda Kant Roy, has been disturbed, and continued payment of full rent under which would be unfair to him. The suit, therefore, is not barred by section 27 of Act VIII., B. C. of 1869.

As to the other point, however, we think that the District Judge has come too hastily to a conclusion; and that it does not follow as a matter of course, that without further enquiry the plaintiff should have a declaration that he is not liable to pay to the defendants more than half of the rent stipulated. The plaintiff seeks relief on equitable grounds, and before he can obtain this, he must fairly lay his whole position before the Court. He must show truly how much land he holds by virtue of his lease from the defendant, and if he has more than he is paying for, that fact must be taken into consideration in determining what, if any, relief the plaintiff is to obtain.

It would not be proper to refer the defendants to a fresh suit for a determination of what ought to be settled on the present occasion. The case must, therefore, go back to the First Court for a new trial, with reference to the above directions, as to the question what, if any, relief ought to be granted to the plaintiff.

The costs of this appeal, as well as of the lower Courts, will abide the result

And this decision will apply also to appeal No. 1587 of 1879.

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GHATTERJI.  
Judgment.

## [ORIGINAL CIVIL JURISDICTION.]

1880 •  
July 19th.

GRISH CHUNDER SEIN . . . . . PLAINTIFF;

AND

OBHOY CHURN MULLICK . . . . . DEFENDANT.

*Decree, Assignment of—Assignee of decree, Title of—Attachment of money  
in Court to credit of suit.*

A, having in a suit obtained an *ex-parte* decree, assigned his interest in such decree to B and C, who neglected to have their names substituted for that of A on the record, the defendant in the suit subsequently obtained an order setting aside the *ex-parte* decree, and allowing him to defend on condition of his depositing in Court the amount of the claim and the costs already incurred.

The money was paid and the suit re-heard, and again decided in A's favour.

Meanwhile D, who had previously obtained a decree for costs against A, had attached the sum deposited in Court in satisfaction of his decree.

On a claim by B and C being put forward under their assignment to the same sum of money, *held*, that although they might have an equitable title, such title could not prevail against that of the attaching creditor.

**I**N this case the plaintiff Grish Chunder Sein, in 1876, instituted a suit against Gudadhur Ghose and Ram Chundro Singhi, to set aside a decree obtained by Gudadhur against his co-defendant, on the ground that the decree had been fraudulently and collusively obtained, and operated to deprive him (Grish Chunder Sein,) of his rights against Ram Chundro.

This suit was dismissed with costs, and the order of dismissal was upheld on appeal.

On the 30th August 1879, Grish Chunder Sein brought a suit against one Obhoy Churn Mullick, to recover Rs. 1,423, and on the 17th November obtained against him an *ex-parte* decree. In this decree Grish Chunder, on the 2nd December 1879, assigned by deed all his interest to Sultan Chand and Nurmoll for Rs. 940.

On the 11th February 1880, Obhoy Churn applied to the Court for, and obtained leave, to come in and defend the suit in which the *ex-parte* had been made, the leave granted being subject to his paying the amount sued for, together with all costs, to the Registrar.

On the 23rd March the suit was re-heard and decided in favor of the plaintiff.

On the 23rd April Gudadhur Ghose (the defendant in the first-mentioned suit), who had not succeeded in obtaining satisfaction of his decree for costs, applied to be allowed to attach the sum deposited with the Registrar in the suit of Grish Chunder Sein *vs.* Obhoy Churn Mullick.

A rule was granted to show cause, within a week, why the attachment should not be made, and on the 20th May the rule was made absolute.

On the 5th July, Sultan Chand and Nurmull applied for and obtained a Rule Nisi to restrain Gudadhur from receiving the money standing to the credit of the suit of Grish Chunder Sein *vs.* Obhoy Churn Mullick in the hands of the Registrar, until their claim should be determined by the Court.

This claim came on for hearing on the 19th July.

*T. A. Apar*, for the claimant, contended that the assignment of the "interest of Grish Chunder Sein in the decree, dated 2nd December 1879," was sufficiently general to cover the sum decreed in same suit after the defendant had been allowed to defend.

[*WILSON, J.*—You ought to have had your names substituted on the record for that of Grish Chunder Sein, either under section 232 or 372 of the Code.]

*Phillips*, who appeared for Gudadhur Ghose, was not called upon.

*WILSON, J.* :—

Possibly Mr. Apar's clients have a complete equitable title, but this cannot prevail against the title of the attaching creditor. I therefore dismiss the claim with costs.

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CHURN  
MULLICK.  
Argument.

*WILSON, J.*



[FULL BENCH.]

1880  
June 1st.

No. 32 of  
1878.

UMAID BAHADUR (DEFENDANT) . . . . . APPELLANT ;

AND

UDOI CHAND (PLAINTIFF) . . . . . RESPONDENT.

*Mitakshara—Sapinda, Definition of—Mitakshara, Chap. II, section 5, verse 3—Oblations, Connection by funeral—Particles of same body, Connection by—Consanguinity—Spiritual Benefit.*

The word "sapinda" in verse 3, section 5, Chap. II of the *Mitakshara* is used not in the sense of "connection by funeral oblations," but of "connection by particles of one body" as defined in *Achar Kanda* (the Chapter on rituals), and, that being so, the deceased's sister's daughter's son must be taken to be a "sapinda," and as such entitled to inherit the estate.

In order to determine whether a person is a "sapinda" of the prepositus within the meaning of the definition in *Achar Kanda*, it is necessary to see whether he and the prepositus are related as "sapindas" to each other, either directly, through themselves, or through their mothers and fathers.

**A**PPEAL from a decision passed by the Additional Subordinate Judge of Gya.

This case was referred to a Full Bench by GARTH, C.J., and PRINSEP, J., on the 8th March 1880. The terms of the Reference were as follows :—

A question of Hindu Law has arisen in this case, which being of great general importance, we think should be referred to a Full Bench.

The plaintiff in the suit, Udoi Chand, claims certain property, as heir to his father Puran Chand, under a conveyance from one Mussamut Nobo Babu, the widow of Mooktar Bahadur, to whom the property originally belonged, and for the purposes of the question at issue it must be taken that the plaintiff has a right to recover the property from the defendant, unless the latter can show that by the Hindu Law he is the heir of Mooktar Bahadur.

The defendant claims to be the heir of Mooktar Bahadur through Mussamut Juswant Koer, his maternal grandmother; his mother having been the daughter of Juswant Koer, and Juswant-Koer having been the sister of Mooktar Bahadur.

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He contends that, standing in this relation to Mooktar Bahadur, he is his bandhu or cognate, and as such, his heir within the meaning of the rule laid down in the Mitakshara, Chapter II, section 5, verses 3 and 6, and in section 6.

It is contended on his behalf, that the term "sapinda" in the latter portion of verse 8 has been mis-translated by Mr. Colebrooke to mean "connected by funeral oblations," whereas its proper meaning is "connected by ties of consanguinity."

If Mr. Colebrooke is right, the defendant could not be a bandhu of Mooktar Bahadur, although, on the other hand, Mooktar Bahadur would be the bandhu of the defendant.

The defendant relies upon a passage in the untranslated portion of the Mitakshara (Achar Adhayaya) quoted by Mr. Justice DWARKA NATH MITTER in 2 Bengal Law Reports, Full Bench Rulings, 82—*Amrita Kumari Debi vs. Lukhinarayan Chuckerbutty*.

See also a passage from Parasara Madhab, quoted at page 33 of the same judgment; the case of *Gridhari Lal vs. The Government of Bengal*, 12 Moore's Indian Appeals, 448, and Mayne's Hindu Law and Usage, sections 436, &c., where the question is thoroughly discussed.

We therefore refer the question for the opinion of the Full Bench, whether the defendant is the heir of Mooktar Bahadur.

Moonshee Mahomed Yusoof, and Baboo Saligram Singh, for the Appellant.

Baboo Mohesh Chunder Chowdhry, Baboo Kalimohun Dass, and Mr. C. Gregory, for the Respondent.

Moonshee Mahomed Yusoof.—The question here to be considered is whether a sister's daughter's son is an heir according to the Mitakshara, and its decision must depend upon whether such a son comes within any of the classes of bandhus enumerated in the Mitakshara, Chap. II, section 6.

The difficulty has been created through a mis-translation having been made by Mr. Colebrooke, and subsequently acted upon,

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of the word "sapinda" in the definition of the word "bandhu" in Mitakshara II, Chap. V, section 3. Mitakshara II, Chap. VI, section 1, says: "On failure of gentiles (*i.e.* gotrajas), bandhus are heirs." Then follows an enumeration of persons who are bandhus, but that enumeration has been held not to be exhaustive, but merely illustrative—*Gridhari Lal Roy vs. The Bengal Government*, 12 Moore's I. A., 448; and *Amrita Kumari Debi vs. Lukhinarayan Chuckerbutty*, 2 B. L. R., (F. B.), 28.

The only definition of bandhus is in Mitakshara II, Chap. V, section 3, last clause:—"For *binnagotra sapindas* are indicated by the term *bandhu*"; which is translated by Colebrooke. "For kinsmen sprung from a different family, but connected by funeral oblations are indicated by the term cognate."

The question is what is to be taken as the proper interpretation of the word "sapinda" in this paragraph.

[JACKSON, J.—A sister's daughter's son is twice removed. There must be some limit put to the extension of *binnagotra sapindas*.]

Yes. But according to my reading, persons six gotras removed are entitled to succeed, and it is undoubted that persons four gotras removed, do succeed. Therefore, I say that Colebrooke's translation of the word "sapinda" of the definition of *bandhu* is too narrow and positively erroneous.

My position is this, that under the Mitakshara law a man, in order to be a sapinda of another, need not be connected with that other by funeral oblations, as this connection is understood by the lawyers of the Bengal School. See Mitakshara II, Chap. III, section 4. The Dayabhaga is entirely based on the principle of funeral oblations, but that is not also true of the Mitakshara.

In section 7, chap. II, § 1, which deals with the succession of strangers, the Mitakshara says:—"If there be no relations of the deceased, the preceptor, and on failure of him, the pupil succeeds." Now the original word translated "relations" is *bandhu*, so that bandhus succeed before strangers. See *Gridhari Lal Roy vs. The Bengal Government* 12 Moore, 463.

In Mitakshara II, section 6, § 2, the respective places of the three classes of bandhus are declared to be determined by reason of greater or less affinity.



gain in section 3, we find that a mother succeeds before the father, first, because her succession is inferred from a text of *Yavalkya* to be first, and second because her consanguinity is nearer. See § 5. Now the text is "to the nearest 'sapinda' inheritance next belongs," § 3. From this, therefore, the meaning of the word "sapinda" is clear, the mother being nearer "sapinda," because nearer in propinquity of relationship.

If the theory of spiritual benefit is to be accepted, the succession must stop with the immediate male descendant of a male, for the connection cannot be traced beyond a sister's son. But in order to arrive at the true test, we must look to the *Mitakshara* itself, and there we will find that, if the theory of spiritual benefit be accepted, then several *bandhus*, who are there specifically mentioned in the *Mitakshara* itself, must be excluded, father's mother, sister's son, mother's brother's son, mother's brother's son, mother's mother's brother's son. But these are not entitled to succeed by reason of affinity to the deceased owner.

The whole of Chap. II is a commentary on the text of *Yavalkya*, which gives the following order of succession:—

The wife and the daughters also, both parents, brothers like-  
wise, and their sons, gentiles, cognates and a fellow student"  
section 1, § 2,—the original word for "cognates" being  
*bandhu*.

In section 2, § 2, it is said:—"As a son, so does the daughter of  
the father proceed from his several limbs. How then should any other  
share her father's wealth?"

In section 3 the order of the parents is determined in favour  
of the mother, first because of the correct etymological meaning  
of the term *matapitarau* ("mother and father," the mother being  
mentioned first)—§ 2; and, secondly, on the ground that the  
affinity of the mother is greater—§§ 3 and 5.

In section 4 preference is given to the whole blood over  
half blood in case of brothers, on the authority of the  
text of Menu: "To the nearest "sapinda" the inheritance next  
belongs."

In section 3, § 4, it is declared that propinquity is the  
not only in case of parents, but in the case of the other

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heirs who are specified, as "*sapindas*, *samānodakas* and other relatives," each of which classes is subsequently described or defined. (See Mayne's Hindu Law, § 458.)

Gotrajas and bandhus are discussed in sections 5 and 6. The principle to be evolved being that, first those of the same gotra succeed, and then those who are out of the gotra.

Those of the same gotra are divided into "*sapindas*" and *samānodakas*,—section 5 § 1.

"Gotrajas are the paternal grand-mother, and "*sapindas*" and "*sapindas samānodakas*," section 5, §1, and on failure of the maternal grand-mother, paternal grand-father and other "*sapindas*" of the same class, they are heirs, since "*sapindas*" of a different gotra are included under the term bandhu, § 3.

The succession of gotra *sapindas* is further indicated in § 5. Then § 6 deals with *samānodakas*, and Vrihat Menu is cited to show that "*sapindas*" extend to seven degrees, and the "*samānodakas*" to the 14th degree.

After those of the same gotra are exhausted come those of other gotras who are called bandhus, and are defined as *binna-gotra sapindas*. This brings us back to the original question.

I have quoted the above passages as showing that the succession is based, not upon spiritual benefit, but upon consanguinity or propinquity.

[PONTIFEX, J.—Is it not extraordinary that after the 7th degree we have again, if your argument is to be accepted, to look to libations as the basis of relationship, whereas up to that degree we have not to do so?]

No doubt the doctrine of spiritual benefit is not entirely lost sight of. As a matter of fact spiritual benefit to some extent is rendered by those who are, according to my argument, entitled to succeed up to the 7th degree. Some spiritual benefit is also rendered by the *samānodakas*.

From Mitakshara I, 11, § 31 it appears that the last six classes of sons who are bound to offer libations do not succeed collaterally.

If succession under the Benares School were dependent upon spiritual benefit, the doctrine would have been that, not of the Mitakshara, but of the Dayabhaga. But I have endeavoured to

in the texts quoted above that the principle of succession in the Mitakshara is that of consanguinity.

There is no definition of "sapinda" in the part of the Mitakshara translated by Colebrooke. But there is such a definition, in another portion, a translation of which is to be found in Westlake's Hindu Law, p. 174. The author of the Mitakshara

is discussing the prohibited degrees of marriage, and it is declared that a person should not marry his "sapinda," "sapinda" relationship arises between two persons connected by particles of one body, that is by consanguinity.

A bandhu must be a "sapinda" of a different gotra, and, according to the Mitakshara, though not according to the bhaga, may be removed by one or more degrees.

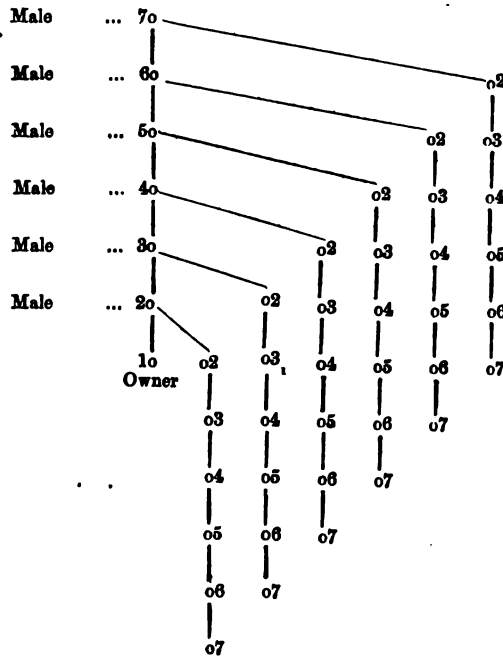
The Mitakshara goes on to say after the passage last quoted:—"The fifth ancestor on the mother's side, and after the seventh on the father's side, the 'sapinda' relationship ceases." And then the rule is laid down for calculating the degrees in the following manner. The rule is as follows:—"In case of a division of property, also, one ought to count up to the seventh (ancestor) from him with whom the division of the line begins. (e.g., if A and B, are sapindas of the common ancestor is removed from either of them than six degrees), and at the counting of the sapinda-relationship be made in the following manner."

According to my reading of that rule the persons connected by "sapinda" relationship are shown in the following tables:—

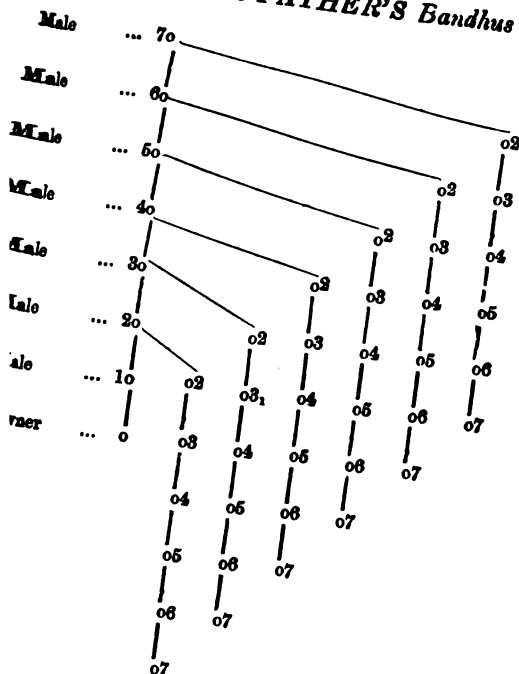
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(1)  $3_1$  = father's sister's

[illegible]

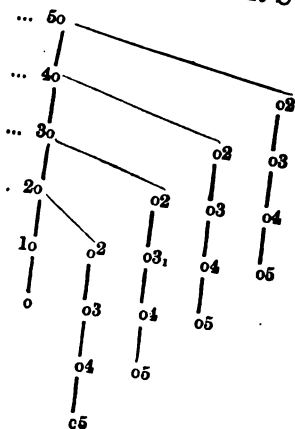
### III.—A man's FATHER'S Bandhus in the paternal line.



(4)  $3_1$  = father's father's sister's son.

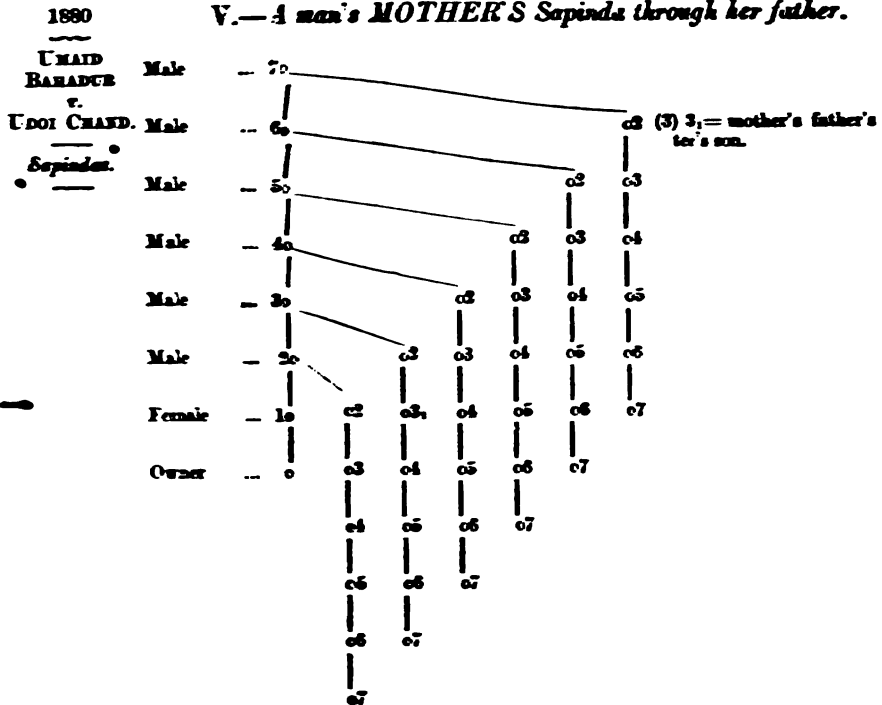
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### IV.—A man's FATHER'S Bandhus in the maternal line.

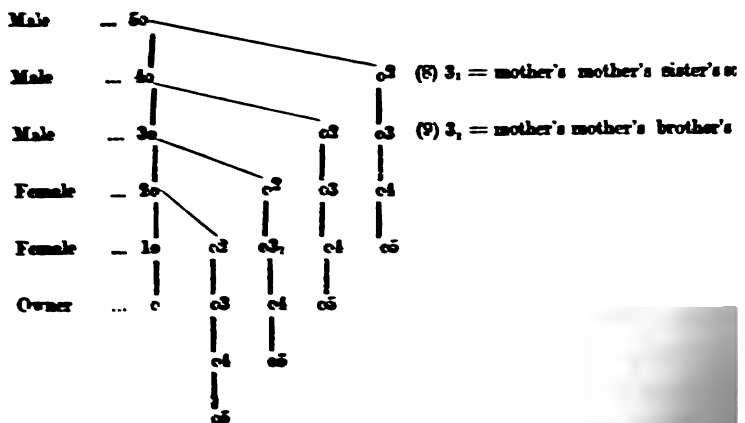


(5)  $3_1$  = father's mother's sister's son.

(6)  $3_1$  = father's mother's brother's son.



VI.—A man's MOTHER'S Sapinda through her mother.



In these tables I have shown a man's own "sapinda" in paternal line as well as in the maternal; and also his father's "sapinda" and his mother's "sapinda" in the paternal line as well as in the maternal.

All the instances of "sapindas" in the Mitakshara fall within one or the other of these tables. West and Bühler have set out a classification of bandhus at page 39 of their book on Hindoo Law. That classification may be worked out in a similar manner, but it will be found that the tables stop short of the tables given above.

It is unnecessary, however, to define the extreme limit, and West and Bühler's classification is sufficiently comprehensive to include the present case.

The tables which I have prepared agree with the Shastor's view in *Umroot vs. Kulyan Das*, 1 Borr., 323, where the opinion of the Court was in favour of the claim of the daughter's son's son. See also *Ilias Coonwur vs. Agund Rai*, 3 Select Rep., 37.

The only case for consideration here is, that of a male tracing his descent through females, and it should be borne in mind that the rule, as to prohibited degrees of marriage, set out at p. 66 of Dr. Guru Das Banerjee's Lectures, would not have been necessary if the descent were only to be derived through males. The authority cited is that of Rughoonundun, who is an authority in the Bengal school.

The view that "sapinda" relationship depends on consanguinity is further supported by the *Vera Mitradaya*, pp. 191, 193, 194, 216 and 217, 161, 185, 189, 196, 195, 196, 198, 199 and 200. See also *Dattaka Mīmāṃsā*, section VI, verses 32, 39 and 40. Section II, verses 2, 3 and 16.

\* The following cases were also referred to:—*Chelikani Tirupati vs. Rajah Surareni Vencata*, 6 Mad. H. C., 278; *Kutti Ammal vs. Rudakristna Aiyar*, 8 Mad. H. C., 88; *Mussumat Doorqa Bibee vs. Janaki Pershad*, 18 W. R., 331; *Lallabhai Bapubhai vs. Mankuvarbai*, 1. L. R., 2 Bom., 589.

*Baboo Mohesh Chunder Chowdry*.—The construction which the other side would put on the word "sapinda" in the Mitakshara in the definition of bandhus is inconsistent with the meaning of the same word in other parts of the book and also with the decisions upon it.

[JACKSON, J.—There is a note at p. 191 of Baboo Shama Churn Sircar's book, that the translation of the passage set out in the judgment in the case of *Amrita Moyee Debee*

1890  
UMAIR  
BAHADUR  
v.  
UDOI CHAND.  
Argument.

1880  
UNION  
BANARAS  
COOL CHAND  
J. S. S. S.

vs. *Lakhee Narain Chuckerbutty*, 2 B. L. R. (F. B.), 28, quoted from *Pias Coomoor vs. Ajad Rai*, is erroneous. The author gives what he considers the correct translation, and points out that the relation of *sapinda* is of two kinds, (1) by consanguinity; and (2) by the offering of funeral oblations.]

The question as to the interpretation of the word "*sapinda*" as used in *Mitakshara*, Chap. II, section 6, has been considered in *Irishari Lal Roy vs. Bengal Government*, 12 Moore's I. A., 448, and there the word *bandhu* is taken to mean kinsman springing from a different gotra and connected by funeral oblations. See p. 463.

JACKSON, J.—But the Privy Council relied on the translation of *bandhu*. We have here to determine whether that translation was correct.

The three-fold division of *bandhus* set out in *Mitakshara*, Chap. II, section 6, referred to at p. 464, seems to bring into the inheritance certain persons who would otherwise be excluded, and who ought to be included, e.g., the *bandhus* of the father, who are to be included for spiritual benefit on the deceased.

If the doctrine contended for by other side be accepted, the distinction between the cognate kindred of his father and a man's own *bandhus* has no meaning.

MITCHELL, J. Neither the *bandhus* of the 2nd or 3rd class present funeral cakes to the deceased, and it has been decided in *Amrita Kumari Debi vs. Lakhinarayan Chuckerbutty*, 2 B. L. R., F. B., 28; also in *Giridhari Lal Roy vs. Bengal Government*, 12 Moore's I. A., 448, that the enumeration of *bandhus* capable of inheriting in the *Mitakshara*, Chap. II, is not exhaustive but only illustrative.]

In the case of *Amrita Kumari Debi vs. Lakhinarayan Chuckerbutty*, 2 B. L. R., at p. 27, DWARKANATH MITTAL, J., points out that all the schools are agreed in accepting the principle of the doctrine of funeral cakes as the key to the whole law of Hindu inheritance.

[GARTH, C.J.—It was unnecessary in this case that that remark should have been made. Besides, Colclough's mis-translation does not appear to have been discovered at that time.]

In *Mitakshara*, Chap. I, section 5, § 52 the same text is given,



reference being made to Menu :—"A son given must never claim the family and estate of his natural father." The reason, the author adds, is that the funeral oblation follows the family, and a son given cannot offer funeral oblations to his natural father.

1880  
UMAIR  
BAHADUR  
v.  
UDOI CHAND.  
Judgment.

[JACKSON, J.—But in a note it is said :—"This must be understood of the case where the giver has no other son."]

In Chap. II, section 2, § 6, the spiritual benefit distinctly appears to be the basis of inheritance.

Now a sister's son is within the second degree, but he is not entitled to rank as heir unless all the agnate relations are exhausted, but if consanguinity were the basis, it is hard to see on what ground he could be excluded.

[The following cases and authorities were also quoted and commented on :—

*Lallabhai Bapubhai vs. Mankuvar Bhai*, I. L R., 2 Bom., 389 ; *Lalla Jotee Lall vs. Mussumat Dooranee Kooer*, W. R., Special No. 173, (S. C.) B. L R., Sup. Vol., 67 ; Mayne's Hindu Law, § 458 ; *Sheo Sehai Singh vs. Mussumat Omed Konwur*, 6 Sel. Rep., 301 ; Smrit. Chand, 196, Mitakshara section V., verses 3 and 6 ; Vyavastha Chandrika, 190.]

Baboo *Kalymohun Dass* followed on the same side.

The Appellants were not called upon to reply.

The Full Bench (1), after taking time to consider the matter, delivered the following judgment :—

We think that the question referred to us should be answered in the affirmative.

If the defendant is a "sapinda" of Mooktar Bahadur within the meaning of verse 3, section 5 of chapter II of Mitakshara, there cannot be any doubt that he is a bandhu of the deceased.

"Sapinda" relationship has been defined by the author of the Mitakshara in Achar Kanda (chapter treating on rituals). The following is a translation of the passage as given in West and Bühler, pp. 174 and 175 :—" (He) should marry a girl who is non-sapinda (with himself). She is called his sapinda who (particles of) the body (of some ancestor, &c.) in common

(1) GARTH, C.J., JACKSON, PONTIFEX, MORRIS, and MITTER, J.J.

Such a one  
between two  
of one body.  
because  
In like  
to his  
through his father  
his own).  
because  
likewise  
his maternal  
is the  
and uncles  
the paternal  
does  
and aunts  
are sapinda  
one body  
are (sapinda  
(the son)  
the body (i.e.  
with the offspring  
the common  
to know that  
exists between the  
with one body, either

— If he has the character of his mother's and after death he will inherit from the mother's side in the same way. If he inherits from the father's side in the father's way, the relationship ceases; these things must be understood, and therefore the word *maternal* which on account of its (etymological) import, connected with having a common 'partures (of one body)' would appear in all men is restricted in its signification, just as the word *marigold* which etymologically means "growing in the mud," and therefore would apply to all plants growing in the mud, designates the lotus only, and the like; and thus the six asces-

dants, beginning with the father, and the six descendants, beginning with the son, and one's self (counted) as the seventh (in each case), are sapinda relations. In case of a division of the line also, one ought to count up to the seventh (ancestor), including him with whom the division of the line begins (e.g., two collaterals, A and B, are sapindas, if the common ancestor is not further removed from either of them than six degrees), and thus must the counting of the (sapinda relationship) be made in every case."

1880  
UMAYD  
BAHADUR  
v.  
UDOI CHAND.  
Judgment.

If in verse 3, section 5, chapter I, the author of the Mitakshara used the word "sapinda" in the meaning which he has given to it in the passage cited above, the translation of Mr. Colebrooke of the verse in question is not correct.

Having taken great pains in accurately defining the word "sapinda" in the beginning of his work, and having said in clear words in the passage in question that "one ought to know that *wherever the word sapinda is used*, there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent," it is hardly reasonable to suppose that the author used the word in another part of the same work in a different sense. It is a well-understood rule of construction amongst the authors of the Institutes of Hindu Law, that the same word must be taken to have been used in one and the same sense throughout a work, unless the contrary is expressly indicated.

It has been said that in the chapter on inheritance the word "sapinda" has been used by the author of the Mitakshara in the sense of "funeral cake." No passage has been cited to support this contention. On the other hand, it appears abundantly clear from the passages to which we refer below, that the author has used the word "pinda in the sense of body" wherever the word sapinda occurs.

In verse 6, section 5, of chapter II, the author, after laying down that "samānodakas" succeed after "sapindas," proceeds to support this rule by citing an authority thus: "Accordingly that Menu says:—'The relation of the sapinda ceases with the seventh person, and that of samānodakas extends to the fifteenth degree; or, as some affirm, it reaches as far as the

1889

C. W. A. D.

BARADUR

C. D. H. C. H. A. S. H.

C. W. A. D.

memory of birth and name extends. This is signified by gotra, or the relation of family name.' "

In commenting upon slokas 252 and 253 of Yajnavalkya the author in Achar Kanda (chapter on rituals) cites this text of Vrihat Menu, and says, with reference to it, that "sapinda relationship with the father does not arise by reason of the connection through funeral cakes, but through the connection of particles of one body." In this part of his work, the author treats of the subject of the funeral cakes. If here he assigns to the word "sapinda" occurring in the text of Vrihat Menu before mentioned, the meaning which he has assigned to it in the definition given above, it is but reasonable to hold that in verse 6, section 5 of chapter II, he has used the word "sapinda" in the same sense.

Again the author in verse 3, section 3, chapter III, discussing the question whether or not the mother is preferential heir to the father, says:—"Besides, the father is a common parent to other sons, but the mother is not so; and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance conformably with the text, 'to the nearest sapinda the inheritance next belongs.' " Here it is evident that the word "sapinda," occurring in the quoted text of Menu, has been used, not in the sense of "connection by funeral cake," but of "connection of particles of one body." Two of the well-known commentators of the Mitakshara, viz., Ballam Bhutto and Bissessur Bhutto, the author of *Subadhini*, in commenting upon this passage, give the same meaning to the word "sapinda" in the cited text of Menu.

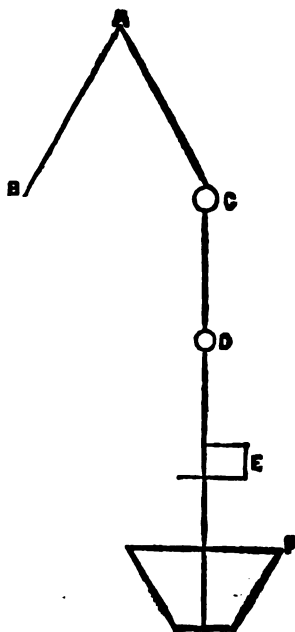
These considerations leave no room for doubt that in verse 3, section 5, chapter II, the author of the Mitakshara has used the word "sapinda" not in the sense of "connection by funeral oblations" but of "connection by particles of one body" as defined in Achar Kanda (chapter on rituals). That this is the case is evident from the fact that some of the enumerated bandhus in verse 1, section 6 of chapter III, admittedly do not confer any religious benefit on the deceased, and therefore cannot be said to be connected by funeral oblations with him. Our conclusion upon this point is supported by a decision of the

Court of Bombay, reported at page 422, I. L. R., 2 Bom.,  
*Bhai Bapubhai vs. Mankuvar Bhai.*

1880  
 UMAID  
 BAHADUR  
 v.  
 UDOL CHAND.  
 Judgment.

The next question for consideration is, whether the defendant in the case that has been referred to us stands in such a relation to Mooktar Bahadur that they are each other's "sapindas" as defined by the author of Mitakshara in Achar Kanda.

The defendant in this case is a descendant three degrees removed from Mooktar Bahadur's father, the common ancestor. Mooktar Bahadur is the son of the maternal grandfather of the defendant's mother. Therefore they are related as "sapindas" to each other. The defendant is a "sapinda" of Mooktar Bahadur, because he is within six degrees from the common ancestor, viz., Mooktar Bahadur's father, and Mooktar Bahadur, because he is the son of defendant's mother's maternal grandfather. In order to determine whether a person is a "sapinda" of the prepositus within the meaning of the definition, it is necessary to see whether they are related as "sapindas" to each other, either directly, through themselves, through their mothers and fathers. Take for example the following table for illustration :—



1880

A is the common ancestor ; B, his son, is the prepositus ; C, a daughter of A ; D, her daughter, both dead ; E is the son of D, and has a son F.

Now B and E are "sapindas" to each other, but not B and F. Although F is within six degrees from the common ancestor, yet B, not being a descendant of the line of the maternal grandfather, either of F or of his father and mother, they are not "sapindas" to each other ; but B being a "sapinda" of E through his mother, they are "sapindas" of each other. The defendant stands in the same relation to Mooktar Bahadur as E does to B. Therefore the question referred to us should be answered in the affirmative.

## [CIVIL APPELLATE JURISDICTION.]

May 28th

No 1944 of  
1872

HAZIR GAZI . . . . . (DEFENDANT) APPELLANT ;

AND

SONAMONEE DOSSEE AND } (PLAINTIFFS) RESPONDENTS.  
OTHERS . . . . . }

*Civil Procedure Code (Act X of 1877), section 13, Explanation V—But judgments—Judgment in former suit against one of several co-sharers.*

*Quæres.*—Whether under section 13, Explanation V, of Act X of 1877, a judgment against a co-sharer in a suit in respect of part of the joint property, is binding upon another co-sharer in a suit against him, in which the same claim, as was made in the former suit, is preferred in respect of another portion of the joint property : and, whether Explanation V, section 13, of Act X of 1877, applies to a judgment under Act XIII of 1859.

**A**PPEAL from a decision passed by the Judge of the 24-*Per-gunnahs*, reversing the decree of the first Moonsiff of Bassirhât.

This was a suit to recover 10½ beegahs of land alleged to have been held by the plaintiffs under a lease executed on the 24th Bysack 1266, by the predecessors in title of the defendants, Nazir Gazi and Hazir Gazi, who were auction-purchasers.

It appeared that in a previous suit in 1873 the present plaintiffs, with the exception of Sonamonee, brought a suit to recover 2 beegahs out of 12½ beegahs covered by the lease in question,

the present suit being in respect of the remaining  $10\frac{1}{2}$  beegahs, of which the plaintiffs alleged they had been dispossessed shortly after the former suit.

In the suit in 1873, Nazir Gazi alone was made a defendant. But although in the present suit he was joined as a defendant with Hazir Gazi, he abstained from defending the suit.

The following issues were raised by the Moonsiff, viz., (1), is the plaintiffs' allegation of possession and dispossession true; (2), is the plaintiffs' lease genuine; and (3), is the judgment on the lease in the former suit against Nazir Gazi conclusive against Hazir. All three issues were found by the Moonsiff against the plaintiffs. On appeal the Judge of the 24-Pergunnahs reversed the decision of the Court of First Instance. The evidence, as to the possession and dispossession alleged by the plaintiffs, he accepted as true. As to the third issue he said: "In the written statement in this suit Hazir Gazi says that he and Nazir jointly acquired the superior tenure of Bonomali and Jarip, (the alleged lessors of the plaintiffs), by purchase with joint funds, in Nazir's name. They were, therefore, jointly plaintiffs' landlords, if the plaintiffs' lease is genuine. The contention of Nazir in the suit of 1873 was in respect of a right common to himself and Hazir, and Hazir must be considered to claim under Nazir,—section 13 of Act X of 1877. The former suit was, therefore, between parties identical with some of the parties to this suit. Those who in this suit were not identical with the parties to the former suit claim under them. The litigation then and now was, and is under the same title. The genuineness of the plaintiffs' lease was directly and substantially in issue in the former suit, and was decided in plaintiffs' favor by a competent Court. \* \* \* The defendants are not competent to question the plaintiffs' lease, and Hazir Gazi is as much bound by the decision in the former suit as the other defendant Nazir."

From the decision of the District Judge Hazir Gazi appealed to the High Court.

*Baboo Jogesh Chunder Roy*, for the Appellant.

*Baboo Nil Madhub Bose*, for the Respondents.

1880  
HAZIR GAZI  
v.  
SONAMONNE  
DOSSER.  
Statement

1880  
 HAZIR GAZI  
 v.  
 SONAMONER  
 DOSSEER.  
Judgment.

The judgment of the High Court (1), was as follows :—

There must be a remand in this case. The Judge has given, to the judgment previously obtained against Nazir Gazi, an effect as regards the brother and co-sharer Hazir which, in our opinion, section 13 of the Code of Civil Procedure does not warrant. That section provides :—“No Court shall try any suit or issue in which the matter directly and substantially in issue, having been directly and substantially in issue in a former suit, in a Court of competent jurisdiction, between the same parties, or between parties under whom they or any of them claim, litigating under the same title, has been heard and finally decided by such Court;” and explanation V, which is referred to, says :—“Where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.”

Now, we are not prepared to say that the explanation has this meaning: that a judgment obtained against a co-sharer in the property is binding against another co-sharer in the property, and clearly it would not be so where the first suit did not purport to have been litigated *bonâ fide* in respect of a right claimed in common by two persons. In addition to that, the judgment relied upon in the present case was obtained long before the enactment of the present Code, and we are not at all prepared to say that explanation V of section 13 would apply to a judgment under the Code now repealed. These considerations very seriously affect the judgment of the lower Appellate Court upon the facts. We think, therefore, that the case must go back, for a new trial. The costs will follow the result.

(1) JACKSON and TOTTENHAM, J.J.



## [CIVIL APPELLATE JURISDICTION.]

JUGGESSUR SINGH ROY AND OTHERS }  
 (DEFENDANTS) . . . . . } APPELLANTS;

AND

BYCONTO NATH DUTT (PLAINTIFF) . . . RESPONDENT.

1880  
 April 30th.  
 No. 1375 of  
 1879.

*Evidence Act, I of 1872, section 83—Map, Presumption of accuracy of—  
 Map made by Government, Effect of cancelling of.*

The fact that a survey map, made by the authority of the Government, has been annulled and superseded by an order of the Board of Revenue, and that a fresh survey has been taken, and a map made in accordance therewith, does not affect the presumption allowed under section 83 of the Evidence Act, as to the accuracy of the former survey map.

**A**PPEAL from a decision passed by the Subordinate Judge of Hooghly, affirming that of the Moonsiff of Mohisrakha.

This was a suit for the recovery of possession of lands. The plaint alleged, *inter alia*, that certain lands, which formed part of the estate of the plaintiff's ancestor, had become diluviated, and that the lands now in dispute had re-appeared on the identical site of the formerly diluviated lands.

In proof of this allegation the plaintiffs put in the Government survey maps of 1844 and 1870.

It appears that the former map had, by an order of the Board of Revenue, been superseded, and the latter, upon a fresh survey being made, substituted.

The Moonsiff accepted the map of 1844 in evidence, and upon the facts adduced granted the plaintiff a decree. On appeal it was objected that that map had been improperly admitted in evidence, inasmuch as it had been set aside.

The Appellate Court, however, upheld the decision of the Court of First Instance.

The defendants thereupon appealed to the High Court, on the ground, among others, that the Courts below had erred in admitting and using as evidence the map of 1844.

1880  
JUGESSEUR  
SINGH ROY

BYCOSTO  
NATH DUTTA

*Judgment.*

*Baboo Hem Chander Banerjee*, and *Baboo Ooma Kali Mookerjee*,  
for the Appellants.

*Baboo Umbica Churn Bose*, for the Respondent.

The judgment of the High Court (1) was as follows :—

We think it may be conceded in favour of the appellants that the lower Appellate Court ought not to have taken into consideration the previous judgments referred to in its decision which it seems were between the plaintiffs and persons other than these defendants; but when that has been conceded, we do not think it follows that, if these judgments had been excluded from its consideration, the decision of the lower Appellate Court would have been the less strong for that. The lower Appellate Court had before it oral evidence, on the side of the plaintiff, which itself, as well as the Moonsiff, evidently considered preferable to that given on the other side. It had also the survey map of the year 1844, to which objection had been taken, that objection being the old formal one, viz., that by an order of the Board of Revenue the entire Government survey of the district of Hooghly had been annulled, and a fresh survey made. That does not appear to us specifically to affect the presumption of law contained in the Evidence Act in favour of the particular survey map of this mouzah, which must be presumed to be correct, until the contrary is proved by the parties. It does not prove the contrary to show that the general survey had been set aside, because it is quite consistent with that order that the actual bearing of the land in suit should be correct. However that may be, it seems that a second survey having taken place in the year 1870, a new map was made, which coincided precisely with that of 1844. Under these circumstances we think that the lower Appellate Court had before it, independently of the decisions objected to, sufficient grounds for affirming the judgment of the Court below. The appeal is dismissed with costs.

(1) JACKSON and TOTTENHAH, J.J.

## [CRIMINAL JURISDICTION.]

IN THE MATTER OF HOSSEIN BUKAS SHEIKH }  
AND OTHERS . . . . . } APPELLANTS ;

1880  
June 24th.

Nos. 266 and  
324 of  
1880.

AND OF

HAKIR SHEIKH AND OTHERS . . . . . APPELLANTS.

*Criminal Procedure Code (Act X of 1872), sections 250, 265—Riot, Trial of members of opposing factions for—Procedure in trials of members of opposing factions in riots—Consent of pleaders to irregularity in trial—Irregularity—Examination of accused by Court.*

The members of two opposing factions in a riot were committed for trial to the Sessions Court, on two distinct and separate committals. The Judge, who sat with a Jury, having taken the evidence of the witnesses for the prosecution in one case, upon his own suggestion, but with the consent of the pleaders for the accused, postponed the taking of the evidence for the defence in that case, and immediately proceeded before the same Jury to take the evidence for the prosecution in the counter case. This having been done, the Court examined the witnesses for the defence in the first case, and then in the second case. The pleaders for the defence in both cases having addressed the Court, and the Government Pleader having been heard in reply, the Judge summed up the facts in both cases to the Jury who returned a verdict of guilty in respect of all the accused.

*Held*, that the procedure resorted to by the Judge was a violation of the salutary rule, that in such cases, the trials should be kept entirely distinct; and that, the accused having been materially prejudiced by the mode of trial adopted, the trials should be set aside.

*Held*, also that the consent given by the pleaders for the defence could in no way cure the defect in the arrangement suggested by the Judge.

The power allowed by section 250 of the Code of Criminal Procedure, authorising the examination by the Court of an accused, does not contemplate his being subjected to cross-examination; and the Judge cannot be allowed, by the method of examination adopted by him, to endeavour to force an accused person to criminate himself.

The object of the power entrusted to the Court by the section quoted, is to enable the Court, from time to time, to give the accused (especially if undefended,) an opportunity to explain, if he desire to do so, any facts which have been spoken to by the witnesses for the prosecution; or, at the close of the case, to obtain from the accused what explana-

1930  
 In re  
 H. B. S. S.  
 H. B. S. S.  
 H. B. S. S.  
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 H. B. S. S.  
 H. B. S. S.  
 H. B. S. S.

and is only liable to suffer regarding facts, which, in the opinion of the Court, implicate the accused with the offence of which he stands charged.

*Reg. vs. Susha Devi & W. B. (F.B.), ac. distinguished. Reg. vs. Shubramani Sa. & W. B. (F.B.) and In re Chinnabai Ghose, 1 C. L. R., 431, followed.*

**APPEALS** from convictions and sentences passed by the Sessions Judge of Bangalore.

*Shri. Suresh Puri, Minister, and Mr. M. L. Sandel, for the Appellants.*

*The Deputy Legal Commissioner for the Crown.*

The facts of the case are sufficiently set forth in the judgment of the High Court, which was delivered by

**JUDGE J. P. P. J.**

It is alleged that by certain villagers of Jaggannathpore to remove an obstruction in the flow of water erected by the villagers of Sikkamarpore, a riot took place, in which Sharintoola, one of the Jaggannathpore people, was killed.

In accordance with the procedure which has been prescribed in such cases by numerous rulings of this Court, the Magistrate held separate proceedings against each party, keeping the evidence against them separate, and he committed the contending villagers for trial by the Court of Session in separate cases.

The case against the Sikkamarpore villagers first came on for trial. After the close of the evidence for the prosecution (so the Sessions Judge records, "by arrangement with the pleaders the case for the defence in the present trial was postponed till after the conclusion of the case for the prosecution in the counter trial," i. e., the case against the Jaggannathpore villagers. The trial of the case last mentioned then commenced. "The Judge required the same Jury, as were then sitting on the counter case," i. e., the case against the Sikkamarpore villagers) "to sit on the present trial. The pleaders for the prosecution and for the defence in both cases had suggested this course." After the close of the evidence for the prosecution in this case, the Sessions

**J. M. and P. J. J.**

Judge returned to the first case and took the evidence for the defence. He then took the evidence for the defence in the second case. The pleaders for the defence addressed the Court in both cases. The Government pleader for the prosecution in both cases replied. The Sessions Judge delivered a written summing up in both cases simultaneously, and then received and recorded the verdict of the Jury, convicting all the prisoners in both cases. The prisoners were accordingly sentenced, and they have now appealed to this Court.

The objection taken in both appeals is the same; that the prisoners have been prejudiced by the manner in which the two cases have been virtually tried together. Before dealing with this objection we feel bound to say that the mode of trial adopted by the Sessions Judge is quite opposed to that which for many years past has been pursued in cases where the members of opposing factions are charged with rioting. The very salutary rule which requires that in such cases each party should be tried separately has here been practically violated by the procedure adopted by the Sessions Judge. It is true that the Sessions Judge has so far complied with this rule as to take evidence and record the defences of the accused persons in each case; but, looking at the procedure which has been already described, we cannot, in any sense of the term, regard these as two separate trials. They are certainly not distinct from one another, because the two trials were not only held before the same Jury, but they proceeded almost in parallel lines until they united in the addresses of the pleaders engaged, and in the Sessions Judge's summing up. There is no authority of law for such a procedure. But it is suggested that the prisoners cannot plead that they have been prejudiced, because this mode of trial was adopted at the suggestion and with the consent of the pleaders engaged. We cannot, however, accept this suggestion; for, as pointed out by MACPHERSON, J., in the case of *Queen vs. Bhola Nath Sein*, 25 W. R., 57, when criminal proceedings are substantially bad in themselves, the defect will not be cured by any waiver or consent of the accused, or (we would add in the present cases) of the pleaders for the accused. The "arrangement," as the

1880

*In re*  
HOSSEIN  
BUKAS  
SHEIKH  
AND  
SHAKIR  
SHEIKH.

Judgment.

PRINSEP, J.

1880

*In re*

HOSSEIN

BUKAS

SHEIKH

AND

SHAKIR

SHEIKH.

*Judgment.*

PRINSEP, J.

Sessions Judge terms it, seems to have been adopted for the convenience of the pleaders themselves, and from a narrow, but we think a mistaken, view on their part, that it would benefit their clients. As for the prisoners themselves, we cannot suppose that they had any voice or understanding in the matter.

We will now proceed to consider the effect of the procedure adopted in the several stages of each case as regards the position of the several prisoners.

The law (section 265, Code of Criminal Procedure) declares that the "same Jury may try as many accused persons successively as to the Court seems fit."

By this we understand that one trial is to follow the other, that is, that on the conclusion of one trial the same Jury may proceed to try the accused in the next case. The law does not contemplate that two trials shall be conducted, piecemeal, in such a manner that at their conclusion the Jury shall be called upon to decide, at one and the same time, upon two distinct classes of evidence which they have points in common require careful discrimination as bearing upon the guilt or innocence of two sets of accused. Independently of the irregularity of the proceeding, no Jury ought, we think, to be placed in such an embarrassing position. It is only fair to the prisoners that the sole issues on which they are to be tried, and the evidence bearing upon those issues, should be laid before the Jury, and that the minds of the Jury should not be encumbered by the consideration of foreign and irrelevant matter.

These considerations do not appear to have been present to the minds of the pleaders of the different accused when they consented to the "arrangement" to which the Judge refers. But, as already pointed out, such consent on their part cannot prevent the prisoners showing, on appeal, that they have been materially prejudiced by the course adopted. It is apparent that the prisoners accused in the second case had not the full benefit of section 243, that is of challenging the Jurors who were to try them. Who can doubt that, if the first case, which was that of the Sikandarpore accused, had been tried out and resulted in an acquittal, the Juggunnathpore accused would have at once challenged all the Jurors on the

ground that they were not likely to address themselves to the case as it affected them with impartial and unbiassed minds? So also the Sikandarpore people might justly complain that, though they had the right of challenge before their own trial commenced, they could have no right to object to the trial by the same jury of the second case, notwithstanding that they might be seriously prejudiced by evidence given in that case, criminating them behind their backs, and without their having an opportunity of cross-examination.

It has been argued that the Sessions Judge has power under the law to adjourn a trial, and that consequently it was not illegal on his part to commence the second trial before the conclusion of the first. But according to section 264, the Court can only adjourn the trial if it "considers that such adjournment is proper, and will promote the ends of justice." No reason for the adjournment in turn of each trial has been stated. From the terms the Sessions Judge's summing up it would seem that the "arrangement" was suggested by himself or by the Government prosecutor, for he states that it was "acquiesced in by the pleaders for the defence in both cases." In our opinion the adjournments were neither "proper" nor likely to promote the ends of justice." But even admitting that under some circumstances a second case may be tried by the same jury, during the pendency of the first trial, it by no means follows (and this constitutes a very grave objection) that the two cases should be summed up together and decided simultaneously.

The Sessions Judge, in the commencement of his summing up, has himself indicated this objection to the procedure adopted by him. He tells the Jury that "the evidence for the prosecution in one case is practically that for the defence in the other, though a special defence has been made in each case." The Judge, no doubt, felt the difficulty in which the Jury were placed, for he states:—"I proceed to sum up the evidence in both cases on this single charge, in which however I will do my best to keep each case, and the evidence proper to it, singly before you." We recognize the Sessions Judge's endeavours to do his duty in this respect, but he seems to have lost

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**SHEIKH.**

*Judgment.*

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sight of the fact that some of the prisoners in each case were examined as witnesses in the other, and that under such circumstances it was impossible to expect that the Jury should be able to separate in their minds what was said by a prisoner as a witness from what he admitted on examination as an accused. A witness, under section 132 of the Evidence Act, cannot excuse himself from answering any relevant question upon the ground that the answer to such question will criminate or may tend, directly or indirectly, to criminate him; but the law also provides that no such answer, which a witness shall be compelled to give, shall be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer. It is unnecessary to refer to the particular statements made by seven of the prisoners, three on one side and

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 Bungshi Dass.  
 Rhedoy Chowkedar.

Natak Sheikh  
 Moslem Sheikh.  
 Hakimollah.  
 Itaha Sheikh.

four, on the other, when under examination as witnesses, but several criminating statements have been made by them especially in cross-examination. The Sessions Judge has made no attempt to exclude these statements, and we think that, in con-

sidering the evidence of both these cases together, the Jury could not separate the evidence in each; and even in spite of the strongest precautions, both on their own part and on that of the Judge, must unconsciously have been influenced in the one case by evidence given in the other. There was no such interval between the two trials as would enable them to efface from their minds the effect of the evidence in one case when considering their verdict in the other. So far, therefore, as the prisoners, who were also examined as witnesses in the two cases, are concerned, we are quite clear that this irregularity has prejudiced them most materially in their defence. It is almost impossible to distinguish between the cases of these accused and that of their fellows, though from the position that the former occupied as witnesses, we have less hesitation in finding that they have been very seriously prejudiced by the mode of trial adopted by the Sessions Judge.

Our attention has been directed to some cases, and particularly to a judgment of a Full Bench, in the case of *Reg. vs. Sheik*



*Buru*, 8 W. R., 47, in which it was held that the simultaneous trial of two parties engaged in a riot did not prejudice them so as to necessitate a reversal of their conviction and a retrial; but we observe that in all these cases the trials were held with the aid of assessors and not by Jury as in the present case. This difference in the trial is most material as regards the particular effect on the prisoners. The Sessions Judge, with whom the decision in the one form of trial rests, is less likely than a Jury to have been influenced by what he learnt in the other case; and while the verdict of the Jury would be final on the facts, the findings of the Sessions Judge would be open to correction by the High Court on appeal.

On these grounds we consider that the prisoners in these cases should be retried before a separate Jury in each case, and we accordingly set aside the convictions and sentences, and direct that the Sessions Judge do so proceed.

We regret to have to notice the manner in which the examination of the accused has been conducted. In permitting a Sessions Judge to examine an accused person from time to time during a trial, the law does not contemplate that he should commence a trial with a strict examination of a prisoner, in the manner of the cross-examination of an adverse witness by counsel.

This Court has already pointed out to the Sessions Judge, on more than one occasion (see particularly the case of *Chinibash Ghose*, 1 C. L. R., 436), that, by exercising the power allowed by section 250, the Sessions Court is not to establish a Court of Inquisition, and to force a prisoner to convict himself by making some criminating admissions after a series of searching questions, the exact effect of which he may not readily comprehend. The real object is to enable a Judge to ascertain, from time to time, from a prisoner, particularly if he is undefended, what explanation he may desire to offer regarding any fact stated by a witness, or, after the close of the case, how he can meet what the Judge may consider to be damning evidence against him. In one of these cases now before us we observe that the Judge was engaged, during the whole of the first day, in examining the accused. In like manner in the second case he examined the accused, at considerable length, before the case for the

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prosecution was opened. Such proceedings appear to us to be an abuse of the power given under the law.

We cannot remember that trials so commenced have been fairly conducted. The minds of both the Judge and Jury are, at the outset, prejudiced by irresponsible statements, made by the accused while subject to this system of cross-examination before their guilt has been established by the examination of a single witness. We trust that the Sessions Judge will discourage the practice which has been repeatedly condemned by this Court, and is in our opinion quite opposed to the spirit of our law in India.

[PRIVY COUNCIL.]

~~James~~ ~~James~~ ~~James~~ AND OTHERS (PLAINTIFFS) . . . APPELLANTS;

AND

~~THE~~ ~~HIMMUNT~~ ~~RAM~~ AWASTI (DEFENDANT) RESPONDENT.

~~Appeal from a decision passed by a Division Bench, Jackson and McMichael JJ., of the High Court at Calcutta on the 10th January 1877.~~  
*Whether a mere expectancy can be the subject of a sale by a guardian, acting or purporting to act on behalf of a minor.*

~~Whether a mere expectancy can be the subject of a sale by a guardian, acting or purporting to act on behalf of a minor.~~

~~Appeal from a decision passed by a Division Bench, Jackson and McMichael JJ., of the High Court at Calcutta on the 10th January 1877.~~

The facts appear from the judgment of their Lordships (1) of the Judicial Committee of the Privy Council, which was as follows:—

This is an appeal by the representatives of two Hindu Baboo Himmunt Ram and Baboo Moorli Saini. Your appeal

(1) Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir LEONARD E. SMITH, and Sir ROBERT F. JACKSON.

re been jointly interested in a conveyance taken in the sole name of the former), against a decree of the High Court, affirming the decree of the lower Court, which had dismissed their suit. The respondent and defendant Birj Bhookun Lal Awasti is the representative of one branch of a family descended from a common ancestor, Deo Kishen Awasti; and the object of the suit was to recover from him one-half of the property of Chintamun, who was formerly the representative of the other branch of the family, to which Birj Bhookun Lal Awasti succeeded on the death of the surviving widow of Chintamun.

In the year 1848, and shortly after the death of Chintamun, Kanhya Lal Awasti, the father of the defendant, brought a suit, alleging that this family, descended from the common ancestor, Deo Kishen Awasti, was a joint and undivided Hindu family, governed by the law of the Mitakshara, and seeking to recover the possession of Chintamun's share from his widows upon that decree. His suit so far entirely failed. It was proved that there had been a partition under which Chintamun held his share as a separate estate, to which his widows were entitled to succeed, Kanhya Lal Awasti being only presumptively the reversionary heir next in succession to them. The decree made was a somewhat extraordinary one. It did not dismiss the suit; but, after affirming the rights of the widows, went on to declare the right of Kanhya Lal Awasti to succeed upon the death of the survivor of them; and further directed that they should pay the costs of the plaintiff whom they had substantially defeated. The only plausible reason for so singular a direction that suggests itself is, that the widows may have raised a question which has not been raised in other cases, to the effect that under the Mitakshara law, a Hindu widow, taking by inheritance her husband's separate property, takes it absolutely and in the nature of an owner. It does not appear on this record that such a contention was raised in the suit, but there was no appeal against the decree, which must therefore be taken to stand. Shortly after it was pronounced Kanhya Lal became insane. His wife seems to have taken the care of him and of his property, and to have acted as the natural guardian of her infant son. In that state of things she executed the kobala of the 17th July 1851, in favor of Himmunt

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Judgment.

Ram, upon which the alleged title of the plaintiffs depends. The widows of Chintamun lived for several years after the execution of that deed, the last of them dying in 1870. Birj Bhookun, who was then of age, thereupon applied in the first instance for execution of the declaratory decree in favour of Kanhya Lal, claiming as the representative of his insane father. His application failed, because it was ruled by the Courts that on the death of the surviving widow he, and not his father, who, though alive, was disqualified by insanity, was the heir of Chintamun next in succession. He then brought in his own right, a suit against certain persons who claimed the property, or portions of it, under conveyances from the widows of Chintamun, and ultimately succeeded in recovering the whole estate, with, perhaps, one small exception. All these facts are stated by the plaintiffs in their plaint, which accordingly admits both the possession and the title of Birj Bhookun, but seeks to recover from him half the property that descended to him from Chintamun by virtue of the transfer alleged to have been made to them by the deed of the 17th of July 1851. Under these circumstances the plaintiffs of course had to establish, first, that the deed under which they claim did purport to pass half the interest of Birj Bhookun; and, secondly, that having been executed as it was by his mother and guardian, it was a transaction within the rules which enable a guardian effectually to alienate the property of an infant ward. A further question was raised in the suit, viz., whether the interest of Birj Bhookun, at the date of the deed, could be the subject of such a conveyance, inasmuch as it was then a mere expectancy.

It being essential for the defendants to prove that there was a justifying necessity for this conveyance, the first thing which strikes their Lordships is the total absence of proof upon that point. It seems to them that on this ground alone the present appeal must fail. It has been argued by Mr. Doyne that there may have been some miscarriage of the Judge, by reason of which neither Court has dealt with this issue, but has disposed of the case upon the other points raised in the cause. It is true that one of the grounds of appeal of the High Court is, that the proper issues had not been framed. But it appears to their Lord-

ships that, though the first issue is not perhaps as happily expressed as it might have been, it does distinctly raise the question whether there was a justifying necessity for the sale in question. On the other hand, it nowhere appears upon the record that the lower Court was not prepared to try that issue, or had reserved it for future trial in case its dismissal of the suit upon the other grounds should be found to be erroneous. They have further to observe that, when they look to the record of what was done in the case by the plaintiffs, they find evidence of an intention to prove some justifying circumstances other than those which are stated on the face of the deed to have been the grounds and reasons for the transaction. The latter are, first, the expediency or necessity for bringing against the widows in possession a suit for waste—a suit which could only be brought by the aid of Himmunt Ram. That suit was afterwards brought, and it failed. Therefore, as far as the event went, it seems to have been a suit which can hardly be said to have been for the benefit of the infant or of his estate. The other is a suggestion that Kanhya Lal had incurred debts to Himmunt Ram; that Himmunt Ram had said that he would bring a suit; and that there was risk that the infant's estate would thereby be damaged. But the passage at page 14 of this record, which states what the plaintiffs were about to prove, and the purpose for which they ask that their witnesses should be summoned, points to an alleged necessity of a different character. They there state:—"The witnesses named under this heading shall prove that Mussamut Badamon Koer was the guardian of Birj Bhookun Awasti"—that is a question on which there is no point raised; "that Kanhya Lal, the father of Birj Bhookun Awasti, was insane"—that further was an admitted fact; "that Birj Bhookun Awasti was under age"—that seems to be also an admitted fact; "that besides the aforesaid Mussamut there was no other lawful guardian; that the income from the estate was very trifling; that the Mussamut aforesaid was in need of maintaining, supporting, and educating her minor sons for which reason she proposed the sale to the ancestor of the plaintiffs; that the ancestor of the plaintiffs having ascertained the necessity negotiated the sale with the aforesaid Mussamut;

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Judgment.

and other particulars." They then give the names of the witnesses who are to prove those facts. Then we find at page 16 a statement that certain witnesses there named, some of whom had been mentioned at page 14, had appeared in Court, but had been allowed to go away; and that the plaintiffs could not get them without warrants to be issued upon them in order to bring them in. The Judge made an order for the issue of the warrants, and there is nothing to show why these witnesses were not afterwards produced and examined. The record, therefore, shows that the plaintiffs not only proposed to prove a different case from that which on the face of the deed appeared to have been the cause and justification for the alienation of the minor's interest, but entirely failed to prove the new case set up.

In these circumstances their Lordships are of opinion that the suit must on this ground be taken to have failed, and that they would be exercising a very unsound discretion if, without more explanation why evidence upon this material issue was not produced, they were to send the case back, and remand for a new trial a claim to property which seems to have been already the subject of much vexatious litigation. It lay upon the plaintiffs to excuse the non-production of these witnesses, and it appears to their Lordships they have wholly failed to do so.

The conclusion to which their Lordships have thus come renders it unnecessary to consider the grounds upon which the Courts in India have proceeded. The point on which the lower Court in part proceeded, and which has only been treated as doubtful by the High Court, namely, whether such an interest could be the subject of a sale at all, is of general importance, and one which their Lordships, who do not sit here to determine abstract questions of law, would be unwilling to determine in a case in which no decree in favour of the plaintiffs can be passed. They are certainly not prepared to affirm that such an interest can be made the subject of a sale, still less that it can be made the subject of a sale highly speculative, as any such sale must be, by a guardian acting or purporting to act on behalf of an infant. The decision of this Board, which has been cited by the Judge of the lower Court, is not precisely in point, but it goes far to show that the principle of English law,

which allows a subsequently acquired interest to feed, as it is said, the estoppel does not apply to Hindu conveyances.

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With reference to the construction of the deed their Lordships deem it sufficient to say that there is, in their opinion, much on the face of it which favours the construction put upon it by the High Court, namely that what it dealt with was the supposed rights of Kanhya Lal, and through him of his infant son under the decree of 1848; but that inasmuch as the appeal must be dismissed on the other grounds which have been stated, it is unnecessary either to affirm or disaffirm that construction.

On the whole, they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

[PRIVY COUNCIL.]

GONESH LAL TEWARI. . . . . APPELLANT;

April 18th.

AND

SHAM NARAIN AND OTHERS . . . . . RESPONDENTS.

*Execution Sale of right and title under zuripeshgi lease—Mesne profits under decree upon zuripeshgi lease.*

A decree for possession and mesne profits having been obtained upon a zuripeshgi mortgage of a certain mouzah executed in favour of M and K, the mortgagor prior to any proceedings taken to execute the decree, obtained a judgment against M and K, and in execution of such judgment attached and sold their "rights and title under the original deed of zuripeshgi lease." The representative of M and K subsequently applied for execution of their decree so far as it related to the recovery of mesne profits.

*Held*, that inasmuch as the decree had not been attached and sold, and the mesne profits depended wholly upon it, the applicant was entitled to execute the decree for the mesne profits due thereunder. The existing rights of the judgment-debtor under the zuripeshgi only were sold.

[Judgment of High Court reversed.]

**A**PPEAL from a decision passed by a Division Bench (KEMP and BIRCH, J.J.) of the High Court at Calcutta on the 24th August 1876.

*Doyle*, for Appellant.

*C. W. Arathoon*, for Respondents.

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 Judgment.

The judgment of their Lordships (1), of the Judicial Committee of the Privy Council, was as follows :—

This was an application by Gonesh Lal Tewari, the appellant, as the representative of Muddun Mohun Tewari and Kally Persad Tewari, who had obtained a decree against the respondents, to execute that decree so far as relates to the recovery of the mesne profits of a mouzah called Koorkooria awarded by it. The judgment is dated the 2nd of June 1860, and was the result of an action which had been brought by the Tewaris against the predecessors of the respondents. The facts are shortly these :—Perhlad Sen, who was the Rajah of Ramnuggur, executed, on the 23rd December 1851, a zuripeshgi mortgage to the Tewaris of certain mouzahs, including Mouzah Koorkooria, for a sum of Rs. 49,453. Shortly after the mortgage, one Binda Lal, the predecessor of the respondents, set up a mokurrari lease of Mouzah Koorkooria, which, as he affirmed, had been granted to him by the Rajah prior to the zuripeshgi mortgage. The suit was brought by the Tewaris to set aside that mokurrari on the ground that it was colourable, and put forward by Binda Lal in collusion with the Rajah to defeat the zuripeshgi, so far as related to Mouzah Koorkooria. The judgment of the 2nd June 1860, the execution of which is in question, states that the claim was for the recovery of “the entire 16 annas of Mouzah Koorkooria, the property let out in zuripeshgi lease on the basis of a zuripeshgi lease dated 23rd December 1851.” The decree was that the plaintiffs do recover possession of the entire 16 annas of the mouzah, and that the mokurrari pottah be set aside. Then there is this award with reference to mesne profits: “That the amount of mesne profits from 1,262 Fusli, to the date of recovery of possession, with interest on the principal amount of each year from the following year up to date of realisation, be awarded to the plaintiffs from the defendant Binda Lal.” This was the decree of the Principal Sudder Ameen. There was an appeal from it to the High Court, and ultimately an appeal from the High Court to this country; and those appeals went on concurrently with another litigation which

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was initiated by the Rajah to set aside the zuripeshgi lease altogether, on the ground that it had been improperly obtained; and in this litigation also there was a series of appeals ending in an appeal heard before this Committee. In the result the Rajah failed in his suit; and the Tewaris succeeded in theirs, maintaining the decree of the 2nd June 1860, on which the present execution proceedings are founded.

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Prior, however, to any proceedings taken to execute this decree, the Rajah obtained a judgment for some debt against the Tewaris, and in the suit in which he obtained that judgment he, by the usual proceedings, attached and sold their interest in the zuripeshgi lease. The purchaser under that sale was his own Rance, and it is said that she purchased benamee for him. However that may be, no question now arises as to the validity of that purchase. It must be taken that the Rance purchased what she professed to have purchased under that decree. The single question in the case is, whether the mesne profits, awarded by the decree of the 2nd June 1860 passed by that sale.

We have nothing on this record but the certificate of sale. The preliminary proceedings do not appear. The certificate of sale is at page 36, and is as follows: "And a petition being put in for the sale of his estate, a sale notification was issued pursuant to an order of this Court, and the estate aforesaid publicly sold at auction on the 7th December 1874 A.D. Whatever title, right, and concern the judgment-debtor had in the said estate have been purchased by Mussamut Maharanee Bind Basini Debi, inhabitant and proprietor of Ramnuggur, Pergunnah Majhwa, for Rs. 15,500, and she had desposited the entire consideration money. Therefore this certificate is granted to Maharanee Bind Basini Debi, the auction-purchaser of the estate aforesaid; and it is hereby proclaimed that whatever title, right, and concern the said judgment-debtor had in the estate aforesaid, have become extinct from the 7th December 1874, the date of sale, and vested in Maharanee Bind Basini Debi, the auction-purchaser. Hereafter this certificate will be considered as a valid deed in respect of transfer of the right, title, and interest of the judgment-debtors." Then there is this description

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 —

of what is sold: "The right and title under the original deed of zuripeshgi lease, dated the 23rd December 1851, for Rs. 42,453 in respect of 15 mouzaha,"—naming them, and including Kookooria. It may be observed that the purchase money is only Rs. 15,500, and the zuripeshgi was given to secure a sum of Rs. 42,453. Upon the application made by the appellant for the execution of the decree of 1860, so far as it awarded means profits, the respondents, who represent the judgment-debtor, Binda Lal, set up this sale as an answer, contending that the right to the mesne profits had passed by virtue of it to the Rance, the auction-purchaser. But the decree, which had been obtained by the Tewaris, was not sold, and presumably was not attached. What was sold is that which appears on the certificate, namely, the right and title under the deed of zuripeshgi, and the right of the judgment-debtor is declared to have become extinct only from the 7th December 1874. This being all that was sold, their Lordships think that the right to the mesne profits under the decree was not the subject of sale. It was no more the subject of sale than any profits of the estate which the mortgagee had received prior to that sale would have been. The title to the mesne profits is derived from the decree. The defendants in that suit were wrong-doers, and the action was brought by the mortgagee against them as wrong-doers. The right to the mesne profits, therefore, depends wholly upon the decree; and if the decree had been sold, the purchaser, as assignee of the decree, would, no doubt, have been entitled to them. The High Court have based their judgment on the erroneous assumption that the rights under the decree were sold. Their Lordships think that is not the effect of the sale. The High Court refers to the judgment of the Subordinate Judge. The Judges say:—"The Subordinate Judge has held that the decree cannot be executed, and that all the rights of the judgment-creditor in that decree have been transferred to the purchaser of the zuripeshgi rights, including the right to execute the decree obtained originally by the appellant before us." Then their own judgment is:—"We also think, with him, that the whole of the rights of the decree-holder (appellant before us) under the decree which he obtained, have passed, with the zuripeshgi rights on

which the decree was based, to the purchaser of those rights." Their Lordships think that this is an erroneous view of the sale. If it had been meant to attach to sell the decree, that might have been done. What was done was to sell the existing rights of the judgment-debtor under the zuripeshgi.

For these reasons their Lordships think the judgments of both the Courts below are wrong. They will, therefore, humbly advise Her Majesty to reverse them, and to remit the case, with a declaration that the appellant is entitled to execute the decree of the 2nd June 1860 for the mesne profits up to the 7th December 1874, the date of the sale, to the Maharanee, with interest, and is also entitled to the costs of the proceedings in both the Courts in India. The appellant will also have the costs of this appeal.

[CIVIL APPELLATE JURISDICTION.]

GHURSOBHIT AHIR (DEFENDANT). . . . APPELLANT ;

June 8th.

AND

CHOWDHRY RAM DUTT SINGH } . . . RESPONDENTS.  
AND ANOTHER (PLAINTIFFS). . . }

*Civil Procedure Code (Act X of 1877), section 13, Explanation II—Estoppel—Decree in former suit, where question before the Court was not tried.*

In a suit for rent alleged to be due under an agreement, the defendant pleaded a right of occupancy. The plaintiff, however, failed to prove the agreement, and the suit was dismissed without the question of the existence of the right of occupancy being considered. Subsequently, the plaintiff sued to eject the defendant, who pleaded that under explanation II, section 13, of the Code Civil Procedure, the suit was barred by the decree in the former suit. *Held*, that inasmuch as the question as to the right of occupancy had not been tried in the former suit, the decree therein did not operate as estoppel.

Explanation II, section 13, of the Civil Procedure Code is meant to apply to cases, where the defendant, having a defence which, if he had pleaded, he might have brought forward, did not put forward such defence, and a decree was given against him.

**APPEAL** from a decision passed by the Subordinate Judge of Bahabad, affirming the decree of the First Moonsiff of Arrah.

The facts appear from the judgment of the High Court.

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GARTH, C.J.

Mr. H. E. Mendies, for the Appellant.

Baboo Doorga Pershad, for the Respondents.

The judgment of the High Court (1), which was as follows, was delivered by

GARTH, C.J. :—

We think that this is a very clear case.

The plaintiff sues to eject the defendant from the property in question, after giving him a proper notice to quit. The defendant sets up a right of occupancy, which has been found against him by both the lower Courts, and the only ground upon which he contends that he is entitled to the judgment of the Court, is this: In a former suit between the same parties, in which the plaintiff sued him for rent due under a written agreement, he (the defendant) set up this same right of occupancy. That suit was dismissed, because the plaintiff failed to prove the agreement; and having failed to do so, the other point with regard to the defendant's right of occupancy was neither tried nor decided. It was of course not necessary under the circumstances to decide it.

But the defendant now says, that although that point was neither tried nor decided in the former suit, still, as it might and ought to have been made his ground of defence in that suit, and as he succeeded in that suit, though upon another ground, he is in the same position now (having regard to explanation II of section 13 of the Civil Procedure Code), as if that point had been then decided in his favor.

I certainly do not read explanation II of that section as enacting anything so unjust or unreasonable. It is intended, in my opinion, to apply to a very different state of things.

It says that, "any matter which might and ought to have been made ground of defence or attack in a former suit, shall be deemed to have been a matter directly and substantially in issue in such suit." According to my view this explanation is meant to apply to a case of this kind; where the defendant has a defence, which, if he had so pleased, he might and ought

(1) GARTH, C.J., and MITTER, J.

have brought forward, but as he did not bring it forward, suit has been decreed against him. The explanation means say that under such circumstances, the defendant is as much bound by the adverse decree, as if he had set up the defence; that he is equally estopped from setting up that defence in future suit under similar circumstances.

That appears to me to be the sort of case which explanation is intended to meet. It certainly was never intended to enable a party to treat a point as having been decided in his favor in former suit, which was in fact not so decided, and which was not necessary for the purposes of the suit to decide at all. The appeal must be dismissed with costs.

[CIVIL APPELLATE JURISDICTION.]

MUZUFFER WAHID . . . . .

AND

DUS SAMAD . . . . .

May 5th.

No. 2241 of  
1878.

*Citation—Symbolical possession—Act XI of 1859, section 29—Arrears of Government Revenue, Sale of land for.*

Where land is sold under Act XI of 1859, for arrears of Government Revenue, the purchaser who has been put in symbolical possession by the proclamation of the Collector, is entitled to sue for actual possession of the land within 12 years for the date of such symbolical possession.

*Juggobundhu Mukerjee vs. Ram Chunder Bysack*, 5 C. L. R., 548, followed.

APPEAL from a decision passed by the District Judge of Gaya, reversing the decree of the Subordinate Judge of that district.

The plaintiffs in this case sued to recover possession of certain lands which they had purchased at a sale, for arrears of Government revenue, held on the 25th April 1864, which was confirmed on the 4th July following. The suit was instituted on the 17th July 1876, the plaintiffs alleging that on the 3rd August they had been put in possession of the lands in question, and had remained in actual possession until they were ousted by the defendants at a subsequent period.

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SAMAD.

Judgment.

It appeared that on the 3rd August, the plaintiffs had, by a proclamation made on that day, been put in symbolical possession by the Collector.

It was found by both lower Courts that there was no evidence of the plaintiffs having had actual possession, or of their having been at any time dispossessed as they alleged. The Court of first instance, however, held that limitation ran from the date of the proclamation, but the lower appellate Court reversed the finding, being of opinion that the defendant's possession became adverse to the plaintiffs on the 7th July 1864, the date of the confirmation of the revenue sale, and that consequently the suit was barred.

The plaintiffs appealed to the High Court.

Mr. R. E. Twidale, and Moonshee Mahomed Yusoof, for the Appellant.

Mr. C. Gregory, for the Respondent.

Mr. R. E. Twidale contended that the adverse possession of the defendants dated from the proclamation of the 3rd August, by which symbolical possession had been given to the plaintiffs, as purchasers at the revenue sale. The plaint was filed on the 17th July 1876, and therefore the suit was within time. He relied on the Full Bench case of *Juggobundhoo Mookerjee vs. Ram Charan Bysack*, 5 C. L. R., 548.

Mr. C. Gregory argued that the question of symbolical possession did not arise; and that the Full Bench case quoted on the other side had therefore no application. The case of the appellant, was, that on the 3rd August 1864, they had taken actual possession and this case they had entirely failed to prove.

The decision of the High Court (1), which was as follows, was delivered by

PONTIFEX, J. PONTIFEX, J. :—

In this case the Government sold, for arrears of revenue, a village called Mouzah Kofarpore Amthowa, which had belonged to the defendants or their predecessors. The sale took place on the 25th

(1) PONTIFEX and McDONELL, J.J.

of April 1864, and it was affirmed by an order of the 7th July 1864, and possession was given under the Act by proclamation on the 3rd August 1864. The purchasers at that sale were the plaintiffs, and they now sue for possession.

Their suit is met by two defences—*first*, that plaintiffs are barred by limitation; and, *secondly*, by a question of boundary, that the land the plaintiffs are now suing for, did not form part of that which was sold at the revenue sale, but formed part of a neighbouring estate which also belonged to the defendants or their predecessors.

With respect to both the questions the Subordinate Judge has given a decree in favor of the plaintiffs; but the Judge, in appeal, has held that the plaintiffs' suit is barred by limitation, and therefore it was not necessary for him to inquire into the question of boundaries.

Now, the ground on which he has held that the plaintiff's suit is barred by limitation is this. He says:—"As to the question when the possession of defendants became adverse to plaintiffs, I must hold, in the absence of proof of possession on plaintiffs' part, that it became adverse from the date of confirmation of sale." That, no doubt, might have been a true conclusion if nothing else had occurred. But the question is not whether after the confirmation on the 7th July 1864 the defendants' possession became adverse, but whether there has been continuous adverse possession from that time notwithstanding the symbolical or constructive possession which was given to the plaintiff by the subsequent proclamation of the 3rd August 1864; whether in fact that proceeding did not make a break in the defendants' possession, and was such an act of possession on the part of the plaintiffs that they are entitled to date from that time in bringing a suit.

Now, we think that this case is similar to the case of *Joggobundhu Mukerjee vs. Ram Chunder Bysack*, in 5 C. L. R., 548, decided by a Full Bench of this Court. Under the Act the Collector was directed, in a certain case, to give possession by proclamation. He did in this case, by proclamation on the 3rd August 1864, give possession to the plaintiffs, and on the authority of the case quoted and upon general principles, we are of opinion that the proclamation was an act of possession by the

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SAMAD.

Judgment.

PONTIFEX, J.

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*Judgment.*

FONTREUX, J.

plaintiffs, and that they are entitled to date their suit from the 3rd August 1864, and that inasmuch as they instituted their suit on the 17th July 1876 they are in time.

The plaintiffs raised a further case, that from the 3rd August 1864 they had actual possession down to the 14th December 1864. That case has been disbelieved by the Judge, and being a matter of evidence, we are bound to accept his judgment on that point. Inasmuch as we think that the plaintiffs' suit was not barred by limitation, it became necessary to send the case back to the Court of the Judge of Gya to ascertain whether or not the property sued for was comprised in the revenue sale of Mouzah Kofurpore Amthowa—an issue which he had not considered it necessary to try before. Of course if it was not comprised in that sale, plaintiffs will not be entitled to the lands in suit, and their suit must be dismissed. If it was comprised in that sale, then as against at all events some of the defendants in this suit, their suit will be in time, and they will be entitled to recover. We say "some of the defendants in this suit," because on the 16th January 1877, at which date limitation would apply, the plaintiffs, on the suggestion of the defendants in their written statement, applied that certain persons, five in number, should be made defendants to the suit, and they were accordingly made defendants. Whether these persons are interested in the land in question or not, and whether or not they have had possession of the lands, is immaterial. The plaintiff's suit as against them is barred.

There were certain other persons, two in number, who themselves applied to the Court that they might be made defendants to the suit, and they were made defendants by an order of the 14th January 1877. The same observation applies to them. As against them the suit has been instituted too late, and as against them must be dismissed. With respect to them, as it was on their own application that they were made defendants, the suit is dismissed without costs.

As against the five defendants who were made defendants on the application of the plaintiffs, we think that the suit must be dismissed with costs.

The other costs of this appeal will abide the result.



## [CIVIL APPELLATE JURISDICTION.]

KALI SUNKER DASS (PLAINTIFF) . . . . APPELLANT;

AND

GOPAUL CHUNDER DUTT (DEFENDANT) . . . . RESPONDENT.

1880  
 May 31st.  
 —————  
 No. 892 of  
 1879.

*Res judicata*—Civil Procedure Code (Act X of 1877), section 13, explanation  
 V—Easements, Claims to.

A decree obtained by A in a suit brought by him to establish a right to close a passage, over which an easement by prescription was claimed by the defendant in respect of his own house, is no bar, on the ground of *res judicata*, to a suit against A by a third person claiming an easement similar to that claimed by the defendant in the former suit over the same passage, and in respect of a house similarly situated.

**A**PPEAL under section 15 of the Letters Patent against a decision passed by Mr. Justice TOTTENHAM, affirming the decision of the Additional Judge of the 24-Pergunnahs, which affirmed that of the Moonsiff of Alipore.

The plaintiff sued to restrain the defendant from erecting a wall and from obstructing a passage, along which he claimed to have a right of way for his mehter to pass for the purpose of removing night soil from his premises.

It appeared that previously to the institution of this suit, the present defendant sued Koylash Chunder Pal, one of his neighbours, to establish his right to erect the wall, and obtained a decree.

In that suit the defence was, that the defendant then was entitled to an easement similar to that claimed in the present suit. The present plaintiff gave evidence in the former suit, and admitted that he had helped in the conduct of that suit, lest his right might be injured.

It was found in that suit that Koylash Chunder Pal had not proved the right claimed having exercised it only fifteen years.

In the lower Courts it was held that the judgment in the former suit was a bar to the present suit.

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DUTT.

Judgment.

The judgment of Mr. Justice TOTTENHAM, confirming the decision of these Courts, was as follows :—

“In my opinion the lower Courts were right in holding that the subject of this suit was *res judicata*, as explained in section 13 of the Civil Procedure Code.

“It is quite true, generally, that a decision as to one person's right of easement can, by no means, determine whether or not other persons have, or have not, a similar right ; but I think in the suit brought by the present defendant (respondent) against Koylash Chunder Pal, the question whether his neighbours, including the present plaintiff, were, or were not entitled to oppose the erection of the wall, was directly and substantially in issue, and was decided by the Court. Although that suit was brought only against Koylash Chunder Pal, he by his answer, and no doubt in good faith, claimed the right of passage as belonging to himself and to the occupants of the houses on both sides of the drain.

“The present plaintiff was one of these, and he personally came forward in support of the alleged common right. It is clear that he is therefore claiming, under Koylash Chunder Pal, within the meaning of explanation V of section 13 (of Act X of 1877) ; and although the decree in the previous suit expressly negatived the right of easement set up by Koylash Pal, still I am of opinion that the Court must have had in its mind the fact that the claim raised on the defence was asserted in supporting it, and that the decision was intended to settle it as against all. I therefore dismiss this appeal with costs.”

The plaintiff thereupon appealed, under section 13 of the Letters Patent.

Mr. C. Gregory, for the Appellant.

Baboo Umbica Churn Bose, for the Respondent.

The judgment of the High Court (1), on the Letters Patent appeal, was as follows :—

The plaintiff in this case is the owner of a house, the back premises of which adjoin certain land of the defendant. At the extremity of these premises the plaintiff has a privy, the contents of which have in part been carried away by a

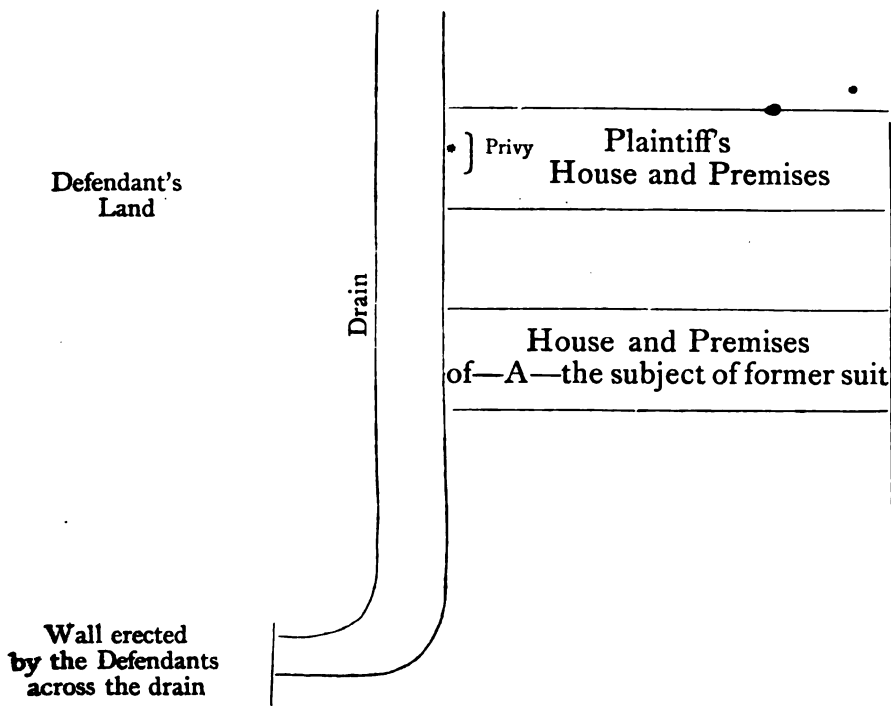
(1) GARTH, C.J., and MITTEE, J.

drain over the defendant's land, and in part have been removed by the plaintiff's sweeper, who has been accustomed to pass along the drain over the defendant's land for that purpose.

The plaintiff contends that in respect of his house and premises, he has a prescriptive right to the use of this drain, and to the passage along it of his sweeper for the purposes aforesaid; but the defendant denies the plaintiff's right, and has built up a wall across the drain in such a position as to prevent the refuse from the plaintiff's privy passing along it, and also to prevent the plaintiff's sweeper from coming up the drain to the plaintiff's back premises.

This suit is, therefore, brought to establish the plaintiff's right to the easement which he claims, and for an injunction to restrain the defendant from interfering with that easement, and for the removal of the defendant's wall.

The following sketch will suffice to explain roughly the position of the premises, the nature of the easement, which is the subject of dispute, and the defence to the suit, which we have to consider in this appeal:—



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DUTT.

Judgment.

he went on to say, that other persons (plaintiff), whose premises adjoined the plaintiff's right.

The defendant and his witnesses whether he had obtained a the drain ; and the plaintiff the purpose of showing any years in a similar case was founded entirely right, and the question upon the Court turned was, whether A and premises had acquired such a prescriptive eventually decided against A, upon the e had only proved a user of the drain equently had not acquired a prescriptive tion Act.

, that in that case A endeavoured to et, that other persons, besides himself, had at no general or public right of damage was did the question of any prescriptive intiff or others, enter into the considera- ould it have done so as a matter of law, nature of the right claimed, A could only *with of his own title in respect of his own* ht which the present plaintiff or other quired in respect of their premises would ance to A.

point which has been raised by the present ll the three Courts have found in his favor ent in the former suit has in fact decided ght, which is raised by the plaintiff in this t, upon which this judgment has proceeded, tion V of section 13 of the new Civil Pro- tion enacts " that no Court shall try any er of which has been heard and finally competent jurisdiction in a former suit." says, that " where persons litigate *bond fide* ight claimed in common for themselves and

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 Judgment.

That defence, upon the strength of which the lower Courts and the learned Judge of this Court have dismissed the plaintiff's case, is, that in a former suit, in which another person, whom we will call A, set up a right against the present defendant similar to that now claimed by the plaintiff, it was decided that no such right existed, and it has been held by the lower Courts, and by the learned Judge in this Court, that this judgment between the defendant and A operates as a *res judicata* in this case to debar the present plaintiff from prosecuting his claim.

We think, however, upon a review of the circumstances of that case, and of the grounds upon which the judgment proceeded, that the plaintiff in this suit is in no way barred by that judgment.

The circumstances are these :—A was the owner of a house, (the position of which is shown in the above plan), the back premises of which adjoined the drain in question in the same way as the plaintiff's premises adjoin it; and A claimed to use the drain in the same way as the plaintiff claims to use it, for the passage of his refuse, and as an access to his back premises.

It then appears that some time ago the present defendant, with a view of stopping up his drain, commenced to build the wall, which is now the subject of dispute; and A then took proceedings before the Magistrate with a view of preventing the defendant from building the wall and so stopping up the drain.

The Magistrate, however, finding that the question between the parties was one of civil right, very properly declined to interfere, except so far as to stay the defendant from building his wall, until the question of right had been decided by the Civil Court.

A suit was then brought by the present defendant against A, asking for a declaration from the Court; that he (the present defendant) had a right to build the wall; and that A had no easement which ought to interfere with the defendant's right to build it. A, in that suit, set up, no doubt, a similar right to that which is claimed by the present plaintiff, i.e., he claimed, that by prescription he had a right to use the drain for the

poses aforesaid, and he went on to say, that other persons (including the present plaintiff), whose premises adjoined the premises of the defendant, were entitled to a similar right.

Upon the trial of that case, the defendant and his witnesses were examined upon the question, whether he had obtained a 15 years' prescriptive right to use the drain; and the plaintiff and others were also called as witnesses for the purpose of showing that they too had used the drain for many years in a similar manner; but the real claim in that case was founded entirely upon A's alleged prescriptive right, and the question upon which the judgment of the Court turned was, whether A and the occupiers of A's premises had acquired such a prescriptive right; and the Judge eventually decided against A, upon the ground that he had only proved a user of the drain for 15 years, and consequently had not acquired a prescriptive right under the Limitation Act.

It is perfectly true, that in that case A endeavoured to disprove himself of the fact, that other persons, besides himself, had used the drain; but no general or public right of damage was claimed by him, nor did the question of any prescriptive right enjoyed by the plaintiff or others, enter into the consideration of the case, nor could it have done so as a matter of law, because, from the very nature of the right claimed, A could only rely upon the strength of his own title in respect of his own premises; and no right which the present plaintiff or other persons might have acquired in respect of their premises would have been of any assistance to A.

Now in this case the point which has been raised by the present defendant, and which all the three Courts have found in his favor is, that the judgment in the former suit has in fact decided the same question of right, which is raised by the plaintiff in this case; and the enactment, upon which this judgment has proceeded, is contained in explanation V of section 13 of the new Civil Procedure Code. That section enacts "that no Court shall try any case, the subject-matter of which has been heard and finally decided by a Court of competent jurisdiction in a former suit." In explanation V says, that "where persons litigate *bona fide* in respect of a private right claimed in common for themselves and

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 DUTT.  
 Judgment.

others, all persons interested in such right shall, for the purpose of section 13, be deemed to claim under the persons so litigating."

It has been decided by the previous judgments in this case that the right claimed by A in the former suit, and the right claimed by the plaintiff in the present suit, is a private right, "*which they claim in common for themselves and others*" within the meaning of explanation V.

We cannot agree in this view; and it appears to us that the mistake has arisen in consequence of the nature of the right claimed not being correctly understood.

The right claimed by the plaintiff is not one, which he and other inhabitants of the neighbourhood claimed *under one common title*. It is a prescriptive right, which he claims individually *in respect of his own house and premises*, and depends upon how long he or the occupiers of the house have used the right.

It would not avail the plaintiff, if all the other owners of the houses in the same locality could prove that they had used the drain for the prescribed period, if he himself, or the occupiers of his premises, had not used it for that period.

The claim, therefore, of each owner is essentially a separate claim in respect of his own premises.

Explanation V of section 13 does not, therefore, apply to such a case. It only applies to cases where several different persons claim an easement or other right by one common title; as for instance, where the inhabitants of a village claim, by custom, a right of pasturage over the same tract of land, or to take water from the same spring or well. (See *Arlett vs. Ellis*, 7 Barn. and Cress. 346; *Blewett vs. Tregonning*, 3 Ad. and Ells, 554).

In this particular case it is very possible that the plaintiff may be able to prove a twenty-years user of the drain, and so establish his right to it in respect of his own premises, although A, who claimed a similar right, failed to establish it, because he could not prove a user for the full period of twenty years.

We think, therefore, that all the previous judgments in this case should be reversed; and that the case should go back to the Moonsiff's Court to be tried upon its merits.

The costs in all the Court's will follow the ultimate result of the cause.

## [CIVIL APPELLATE JURISDICTION.]

SHUMSHER ALI (DEFENDANT) . . . . PETITIONER ;

AND

KOORKUT SHAH (PLAINTIFF) . . . . OPPOSITE PARTY.

1880  
July 11th and  
19th.No. 12 of  
1880.*Small Cause Court Act XI of 1865, section 21—New trial—Review—Civil Procedure Code, Act X of 1877, sections 623 to 624—Procedure.*

A Judge of a Court of Small Causes has jurisdiction in a case, decided by his predecessor, to entertain an application for a new trial made under section 21 of Act XI of 1865, although the applicant does not seek for the rectification of any clerical error, nor base his case upon the discovery of any new and important matter or evidence.

*Per GARTH, C.J.*—In dealing with applications for a new trial, under section 21 of Act XI of 1865, a Small Cause Court Judge is bound to observe and respect the manifest intention of section 624 of Act X of 1877.

See *Ishan Chandra Banerjee vs. Lochun Gope*, 5 C. L. R., 559.

**R**EFERENCE under section 617 of Act X of 1877, submitted by the Officiating Judge of the Small Cause Court of Sealdah.

The terms of the reference were as follows :—

“This is an application under section 21 of Act XI of 1865, for a new trial of a case which had been decreed in favor of plaintiff by Mr. RYLAND, the permanent Judge of the Court. The opposite party contends, *inter alia*, that under section 624 of the Code of Civil Procedure no application can be made to me to review an order passed by my predecessor, inasmuch as the applicant does neither seek for the rectification of any clerical error, nor base his case upon the discovery of any new and important matter or evidence. The only point to be determined is, whether I have jurisdiction to entertain the application and direct a new trial.

Section 624 of the Code applies to petitions for review of judgment where the reasons for re-opening a decision is on some ground or other contemplated by section 623. The chapter in which these sections occurs has been extended to Courts of Small Causes in the Mofussil, as schedule II appended to the Code



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shows. Section 21 of Act XI of 1865, in the last provisional clause, enacts that it shall be competent to the Court if it shall think fit . . . . . to grant a new trial.

\* \* \* \* \*

In the first place where an application for new trial under section 21 contains some ground contemplated by section 623 of the Code, what would be the period of limitation within which it is to be made? It is seven days under the former section and ninety days under the latter.

In the second place, an application for new trial requires a Court-fee stamp prescribed for petitions. An application for review must be made on payment of half the fees prescribed for plaints.

In the third place, new trial applications made by defendants are only admissible when they deposit the entire amount of judgment; applications for review have no such condition precedent annexed to them.

In the fourth place, it would be extremely difficult to distinguish an application under section 21 from one under section 623 of the Code, where a sufficient reason contemplated by the latter may be the reason why 'the Court shall think fit' to grant a new trial under the former section."

Moonshee *Serajul Islam*, for the Petitioner.

Baboo *Saroda Churn Mitter*, contra.

The following judgments were delivered by the Court (1) :—

GARTH, C.J. GARTH, C.J. :—

As section 21 of Act XI of 1865 has not been repealed or affected by the Civil Procedure Code, 1877, I am of opinion that the provisions of that section are still in force with regard to applications for a new trial, and that they are not directly controlled in their operation by section 624 of the Civil Procedure Code. That the two procedures (viz. the one for a new trial, and the other for review), are both still in force, has virtually been decided by Mr. Justice JACKSON and Mr. Justice TOTTENHAM in the Small Cause Court reference Nos. 69 and 70 of 1879.

(1) GARTH, C.J., and MITTER, J.

At the same time I think it right to add, that, having regard to the nature of the question referred to us, in my opinion any Small Cause Court Judge, in dealing with applications for a new trial under section 21, is bound to observe and respect the manifest intention of section 624, which is indeed only an enactment by the Legislature of the rule, which had been previously laid down by this Court as a guide to the Judges of Subordinate Courts, when dealing on review with their predecessors' judgments. (See *Ellem vs. Basheer*, I. L. R., 1 Cal., 184; and *Roy Beghraj vs. Bejoy Gobind Bural*, *ibid.* 197).

It is to my mind manifestly improper for one Judge to review or grant a new trial of a case decided by his predecessor, where the alleged error consists in the determination of some question of law or fact, upon which the one Judge has only the same materials, and the same means of forming a satisfactory conclusion, as the other.

I think that it would be quite as indecent under such circumstances, for one Small Cause Court Judge to reverse a decision of his predecessor, as it would be for one Division Bench of a High Court consisting of two Judges to reverse the decision of another Division Bench of the same Court also consisting of two Judges.

Our attention was directed during the argument to a case decided by the Privy Council in the year 1876,—*Reasat Hossein vs. Hadjee Abdoola*, L. R., 8 I. A., 221, but the point now under consideration was not discussed or even alluded to in that case.

The question there arose, whether one District Judge had jurisdiction to review the decision of his predecessor, for any cause other than some positive and apparent error of law, or the discovery of new evidence; and their Lordships state in their judgment, that looking to the extreme generality of the terms used in sections 376 to 378 of Act VIII of 1859, they were not prepared to say, that one Judge had absolutely no jurisdiction to review the decision of his predecessor, whenever the parties failed to show that there was some positive error of law in the former judgment or new evidence to be brought forward.

That case was decided upon the language of the Civil Procedure Code of 1859, which differs in some respect from that of the new

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Judgment.  
GARTH, C.J.

1889  
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KOORKUT  
SHAH.

*Judgment.*

GABTE, C.J.

Code; and in which notably there was no provision similar to that section 624.

This section seems to me to declare very plainly what the views of the Legislature are upon the point now under discussion.

It is very probable that at the time when these review sections of the Civil Procedure Code were passed, the operation of section 21 of the Act of 1865 did not receive sufficient attention.

As Small Cause Court cases in this country are tried, both as regards law and fact, by the Judge alone, it is difficult to conceive any reasons which would justify a new trial, which would not also afford good grounds for a review, and if so the principle, if not the actual provisions, of section 624 ought to be applicable to new trials as well as to reviews. Although, therefore, in this instance the Small Cause Court Judge has jurisdiction under the circumstances to entertain the application for a new trial, I think that in the exercise of that jurisdiction he should be guided by the consideration to which I have referred.

MITTER, J. MITTER, J. :—

I am also of opinion that the present Officiating Judge of the Court of Small Causes at Sealdah has jurisdiction to entertain an application for a new trial. As to the grounds upon which he should grant a new trial in the case out of which this reference has arisen, I express no opinion, as that is not one of the questions referred to us.

## [CIVIL APPELLATE JURISDICTION.]

JLMUS BANU AND OTHERS . . . . .

AND

IAHOMED RAJA . . . . .

1880  
June 10th.No. 743 of  
1880.*Limitation on bond, payable on 30th Pous, in a year when that month contained only 29 days—Intention of Parties.*

Where a bond was made payable on 30th Pous 1283, it turned out that Pous of that year contained only 29 days; it was held that limitation must be taken to run, not from the 29th Pous, but from the day following.

**R**EFERENCE under section 617 of the Code of Civil Procedure submitted by the Sudder Moonsiff of Soodharam.

The terms of the reference were as follows:—

“This is a suit on a bond dated 16th Kartick 1283 B.S., the due date of repayment being 30th Pous 1283. The defendant leads limitation. On a reference to the almanac for the year 1283, it appears that there were only 29 days in the month of Pous 1283, and the 29th of Pous 1283, the last day of the month, corresponded with the 12th of January 1877. The present suit was filed on the 13th January 1880. The plaintiff's leader argues that, although there were only 29 days in the month of Pous 1283, he is entitled to calculate the period of limitation from the 30th day, commencing from the 1st Pous, i.e., from the 1st Magh 1283, corresponding with the 13th January 1877, and that accordingly this suit, filed on the 13th January 1880, is in time.

I am under the impression that when the 30th Pous 1283 was fixed in the bond as the due date of repayment, the parties never intended that the day of repayment should be in the month of Magh. By (३० चैत्र) the parties, according to the custom of the country, evidently intended the last day of the month of Pous 1283, irrespective of the number of days the month should consist of, and even if they did not intend any such thing, at least they can calculate limitation from the last day of Pous, whatever it is, and cannot go beyond it. When the month “Pous” is distinctly mentioned in the bond, they cannot calculate limitation from any day in Magh. I am of opinion that the suit

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 Judgment.

is barred, but as the plaintiff prays that a reference be made to the Honorable High Court on this point according to chapter XLVI of the Civil Procedure Code (Act X of 1877), I consider it fair to do so, and accordingly dismiss the claim contingent upon the opinion of the Honorable High Court on this reference."

The opinion of the High Court (1), on the question submitted, was as follows :—

This is a case referred by the Sudder Moonsiff of Soodharam, under section 617 of the Code of Civil Procedure, raising the question of the date of payment fixed in a bond as governing the application of the law of limitation.

The date for payment of the money due under the bond is entered in it as the 30th Pous 1283. The month of Pous varies, sometimes containing 29 and sometimes 30 days. In the year 1283 the month of Pous contained only 29 days, and the 29th, or the last day of Pous, corresponded with the 12th January 1877.

The present suit to realize the money due on his bond was brought on the 13th of January 1880, and the point submitted to us is, whether the suit has been brought within three years from date on which the money became payable.

The Moonsiff states as his opinion that "the parties never intended that the day of repayment should be in the month of Magh. By (৩০ পৌষ) the parties, according to the custom of the country, evidently intended the last day of the month of Pous 1283, irrespective of the number of days the month should consist of."

This is no doubt one mode of interpreting this term of the contract. At the same time we think that when the bond by its terms gives expressly 30 days from the commencement of Pous as the limit of payment, the period of limitation applicable to a suit brought to enforce payment should be reckoned from such thirtieth day. Both parties at the time of execution of the bond understood that there were 30 days in Pous of that year, and so made the thirtieth day the limit of the term of payment. There is nothing in their conduct, or in the terms of the agreement from which it can be inferred that they intended the 29th of Pous to be the limit. We are not aware that the custom of the country

is as stated by the lower Court, nor does it appear that it was established in evidence in the present case. Consequently the present contention of the obligor is in our opinion in direct opposition to this, the original understanding between the parties. The obligor, as it seems to us, wishes to evade by this plea of limitation the payment of a just debt, and to act contrary to the expressed intentions of the parties at the time of entering into the contract.

Accordingly we are of opinion that this suit is not barred by limitation.

[CIVIL APPELLATE JURISDICTION.]

TARINI PROSAD MISSER AND OTHERS } PETITIONERS;  
(DEFENDANTS) . . . . . }  
AND  
MAHAMMAD CHOWDHRY (PLAINTIFF) . OPPOSITE PARTY.

January 23rd.  
No. 1665 of  
1879

*Sonthal Regulation III of 1872, section 5—Reference under Regulation III of 1872, Appeal from order upon—Act VIII of 1859—Appeal—Settlement cases.*

A decision on an issue or in a suit properly referred to a Civil Court, in the Sonthal Pergunnahs, under section 5, Regulation III of 1872, is appealable to the High Court under Act VIII of 1859, which is still applicable to the Sonthal Pergunnahs.

*Quære.*—Whether, having regard to Regulation III of 1872, and the notification by the Lieutenant-Governor, dated 7th May 1872, a valid reference can be made in a settlement case in the Sonthal Pergunnahs by a Settlement Officer.

**T**HIS was a rule to show cause why an appeal, presented on behalf of Tariui Prosad Misser, from an order dated 18th September 1879, by a Deputy Commissioner in the Sonthal Pergunnahs, should not be admitted by the High Court.

*H. Bell* shewed cause.

The circumstances under which the rule was obtained are very fully set forth in the judgment of the High Court (1):—

In considering this rule it is desirable to trace the proceedings which have already taken place.

(1) MACLEAN and TOTTENHAM, J.J.

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TARINI  
PROSAD  
MISSE  
v.  
MAHAMMAD  
CHOWDHURY

*Judgment.*

In 1864 the opposite party, Mahammad Chowdhury and others, whom we will call plaintiffs, purchased, at an execution sale, in the Beerbhoom Civil Court, the right to lands in the Sonthal Pergunnahs, but their attempt to get possession under section 263 of Act VIII of 1859, failed.

They then instituted a suit for possession under section 26, Regulation III of 1872 (the Sonthal Settlement Regulation), before the Sonthal Court in 1876, and obtained a decree on the 8th January 1877. Their opponents appealed against this decree, but as about this time the land came under settlement, and as they (opponents) got the settlement concluded with them, they withdrew their appeal.

Plaintiffs then applied for execution of the decree of January 8th, 1877, which was refused on 19th December 1877. They had, however, in the meantime, appealed against the Settlement Officer's decision in their opponent's favour on the 28th August 1877.

That appeal came before the Commissioner on the 11th June 1878, and he, considering the matters in dispute required to be decided by the Civil Court established under Act VI of 1871, framed five issues which he directed his Subordinate Settlement Officer to refer to the Civil Court under section 5, Regulation III of 1872.

The Deputy Commissioner, who exercises the power of a District Judge, under Act VI of 1871, recorded his decision on those issues, and certified them to the Settlement Officer on the 18th June 1879, and the Settlement Officer (who was accidentally, perhaps, the same officer who presided in the Civil Court), gave effect to the decision on 12th August 1879. The decision of 18th June 1879, and the subsequent settlement orders, which were finally confirmed by the Commissioner, were in favour of the plaintiffs.

The origin of this rule is a petition filed by Tarini Prosad Misser and others, defendants, on 11th September 1879, in which they ask this Court to admit an appeal against the decision of the 18th June, and this course has been adopted as the appeal is stated to be a new one of its kind. A question of the amount of Court fee requisite was also raised.

A rule having been granted, it has been opposed on behalf of the plaintiffs by Mr. H. Bell, and that learned Counsel submitted two points for his clients: *Firstly*, that decisions of the Sonthal Officers, vested with powers under Act VI of 1871, are not appealable to this Court; and, *Secondly*, that if they are, the decision of the 18th June 1879 is not a decree appealable under the Civil Procedure Code, Act X of 1877.

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TARINI  
PROSAD  
MISSER  
v.  
MAHAMMAD  
CROWDNEY.  
Judgment.

In the course of his arguments the learned Counsel took us over the Act, Regulation, and Notifications which constitute the Law, and provide for the administration of justice in suits over Rs. 1,000 in value, and he contended that the investiture of certain officers in the Sonthal Pergunnahs, with powers under Act VI of 1871, was not in effect an introduction of the general law including the Code of Civil Procedure.

As a matter of fact the general law, including Act VIII of 1859, which was extended to the Sonthal Pergunnahs by Notification in 1867 (in *Calcutta Gazette*, 1867, p. 1369) has never ceased to be in force in the Sonthal Pergunnahs as regards suits referring to matters exceeding Rs. 1,000 in value.

Prior to 1855 the Sonthal Pergunnahs were governed by the same laws as the neighbouring districts, but while Act XXVII of that year removed them from the operation of these laws, in many respects, it continued the operation of these laws in civil suits in which the matter in dispute exceeded Rs. 1,000. In these suits the Civil Court of Bhaugulpore and Beerbhoom continued to exercise their former jurisdiction.

In 1871 the Civil Court Act was passed, constituting Civil Courts throughout the jurisdiction of the Lieutenant-Governor of Bengal.

The Sonthal Settlement Regulation was passed in 1872, and while it defines the laws applicable to the Sonthal Pergunnahs, it still did not touch the jurisdiction of the Civil Court of Bhaugulpore and Beerbhoom, nor did it put an end to the operation of the general laws (including Act VIII of 1859, the Civil Procedure Code) in suits in which the matter in dispute exceeds the value of Rs. 1,000, (*vide* section 3, clause 2,) when such suits are tried in the Courts established under Act VI of 1871.

The result was, that in 1872 the law of Procedure was the Civil Procedure Code, Act VIII of 1859, and the tribunals were



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 TAIBINI  
 PROSAD  
 MISSEB  
 v.  
 MAHAMMAD  
 CHOWDHEE.  
 Judgment.

the Civil Courts established under Act VI of 1871, viz. Courts of Bhaugulpore and Beerbhoom, for all suits in which the matter in dispute exceeded Rs. 1,000 in value.

In 1873 the Lieutenant-Governor, by virtue of his power under section 4 of Regulation III of 1872, terminated the jurisdiction of the Civil Courts of Bhaugulpore and Beerbhoom, and invested the Deputy Commissioner of Sonthal Pergunnahs with powers of a District Judge, and other officers with powers of a Subordinate Judge, under Act VI of 1871, but he did not interfere with the operation of the Civil Procedure Code in cases to which it already applied. All that he did was to substitute one set of officers for another.

It was indeed argued that the new set of officers were not constituted Courts under Act VI of 1871, but this contention cannot be adopted. With the exception of certain sections (8 to 9, 32, 33, 34), all the provisions of that Act apply, *mutatis mutandis*, to invested officers, and section 15 lays down that every District Judge, Subordinate Judge, &c., under this Act shall be deemed to be a *Civil Court* within the meaning of the Code of Civil Procedure and of this Act. No further arguments seem necessary for disposing of the first point submitted by the learned Counsel who opposed the rule. If these are Courts under Act VI of 1871 in the Sonthal Pergunnahs, and we think these are, those Courts are, beyond doubt, subject to the control of this Court, and this principle has been affirmed by this Court within a recent period—*Kaliprosad Rai vs. Meher Chundro Roy*, I. L. R., 4 Cal., 222.

The second branch of the argument was directed to shewing that, assuming that this Court had appellate jurisdiction, the Deputy Commissioner's decision of 18th June 1879 is not an appealable decision under the Civil Procedure Code.

It must be understood that Act X of 1877 has not been extended to the Sonthal Pergunnahs, and that Act VIII of 1859 is still in force there.

We have here to make no mention of section 5 of the Sonthal Pergunnahs Regulation, which imposed an important, but temporary, limitation on the powers of the Civil Courts, established under Act VI of 1871. It prohibited them, until completion and notification of the settlement, from taking cognizance of any suit

or land or rent without reference from the Sonthal Officers, and it gave the local Government power to decide whether such suits should be tried by the Sonthal Officers, or by another class of officers called Settlement Officers.

Accordingly, the Lieutenant-Governor, by a notification of 7th May 1872, directed the trial of such suits by the Sonthal Officers who are authorized to refer the suit or issue arising in such suit for trial by the Courts established under Act VI of 1871; but here appears to be no authority for reference of any matters to Civil Courts by Settlement Officers in their dealing with settlement cases. If this is a correct view of the law the reference which led to the decision of 18th June 1879 by the Civil Court would seem to have been without authority.

The immediate question, however, before us must be taken to be whether, assuming the Civil Court to have been duly in possession of certain issues for trial, its decision on these issues is final or whether it is open to appeal.

By section 5 of the Regulation, the decision of the Civil Court is to be certified to the referring officer, and to be applied or executed by him. Now it appears to us that the object of this section was to secure for the Sonthal Courts an adjudication by the regular tribunals on intricate or important questions arising in suits; and if they are entitled to such adjudication, and are to act upon them *simpliciter*, it is to be presumed that the fullest consideration of the questions by the Civil Courts is desired. This will not be obtained by anything but that of a decision of the ultimate Court of Appeal, and consequently there seems to be no reason why there should not be an appeal, and special appeal in this country, and appeal followed by appeal to England if the questions at issue are of sufficient importance and value.

On the other hand this Court, in the exercise of its Appellate Jurisdiction, was confined by section 23 of Act XXII of 1861, to appeals from decrees, and the question is the decision of a Civil Court under section 5 of Regulation III of 1872, a decree?

Undoubtedly it is the formal expression of an adjudication in Civil Court, which adjudication, so far as the Court expressing decides the suit, and this is the definition of a decree under the present Code of Civil Procedure.

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PROBAD  
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v.

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CHOWDHRY.

Judgment.

1880  
TARINI  
PROSAD  
MISSEN  
v.  
MAHAMMAD  
CHOWDHRY.  
*Judgment.*

That it has been, or will be executed by another Court, appears to make no difference in its character, and therefore we think that we should treat a decision in a suit, or an issue in a suit referred to the Civil Court, as a decree and open to appeal.

Mr. Bell insisted upon our applying an analogy, founded upon the Bengal Act VII of 1876, sections 58, 59, 62, 63, and under that Act the Collector may call upon the Civil Court to decide a question of disputed possession, and the decision of the Civil Court is final, but section 89 preserves a right to sue for possession, &c., notwithstanding the decision of the Civil Court on the reference.

The analogy however is incomplete. There is a distinct provision for the finality of the decision of the Civil Court for certain purposes in the Registration Act, and perhaps it might be held that if reference to the Civil Court is permissible under the Regulation of 1872 in settlement cases, the decision might be final in the same sense. We have expressed our doubts as to the legality of the reference in this case, which is a settlement case, and we further doubt our power to go behind that reference in this stage of the proceedings; but if those doubts are well founded, that question may be raised before this Court at the hearing of the appeal. We think it sufficient to say that, in our opinion, a decision on an issue or in a suit, properly referred to the Civil Court, under section 5 of Regulation III of 1872, is appealable to this Court under the Civil Procedure Code, Act VIII of 1859. We, therefore, direct that this appeal be admitted. Respecting the amount of Court fee payable on this appeal, we think that, having regard to the nature of the contention, as set out in the petition of appeal, we must treat the petitioners as seeking a declaration of right to settlement, and the proper amount of Court fee is Rs. 10. The rule is, therefore, made absolute with costs.

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## [PRIVY COUNCIL.]

HIRA LALL . . . . . APPELLANT ;

AND

BUDDRI DASS AND OTHERS . . . . . RESPONDENTS.

1880  
March 9th.*Limitation—Proceeding to enforce decree—Jurisdiction—Bona fides.*

A proceeding for the purpose of obtaining execution of a decree taken *bond fide* and with due diligence before a Judge, whom the party instituting the proceeding *bond fide* believes, though erroneously, to have jurisdiction, especially when the Judge himself also supposes that he has jurisdiction and deals with the case accordingly, is a proceeding to enforce the decree within the meaning of section 20 of Act XIV of 1859.

Compare Act XV of 1877.

*Roy Dhunput Singh vs. Mudhomottee Debia*, 11 B. L. R., (P. C.,) 23.

**A**PPEAL from a decision passed by the High Court of the N.-W. Provinces.

The facts appear from the judgment of their Lordships of the Judicial Committee (1), which was as follows:—

The question in this case is whether the judgment-creditors, who on the 14th of January 1867 obtained, in the Court of the Judge at Agra, a decree against the respondents, were, on the 9th of April 1874, barred by limitation from executing it. It appears that on the 3rd of December 1868 the Judge sent the decree to the Subordinate Judge of the district to be executed by him, and that on the 3rd of April 1869 the Subordinate Judge struck the execution case off the file. On the 9th of April 1874 the case was re-instituted in the Court of the Judge by the petition which has given rise to the question now to be determined.

Between the 3rd April 1869, when the Subordinate Judge struck the case off his file, and the 9th April 1874, proceedings were from time to time taken by the decree-holders in the

(1) SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH and SIR ROBERT P. COLLIER.

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*Judgment.*

Court of the Subordinate Judge to enforce the decree ; but the question is, whether those proceedings were sufficient to prevent the operation of the Limitation Act, XIV of 1859, section 20.

It appears that on the 18th February 1870 an application was made by the decree-holders to the Subordinate Judge to set off a debt of Rs 1,300, which they owed to a debtor of the respondents, against so much of the amount due to them under the decree, and at page 6 of the record it will be found that the Subordinate Judge made an order that the application should be granted, that the decree-holders should file a receipt for Rs 1,300, and that the case should be struck off the pending file. On the 18th February 1870, therefore, the Subordinate Judge made an order by which a portion of the debt, to the extent of Rs 1,300, was satisfied. Subsequently on the 8th of January 1872 an application was made to the Subordinate Judge to send a certificate of the decree to the political agency at Indore, in order that the decree might be executed there ; whereupon he made an order that the Judge should be requested to send the record of the execution of decree ; but inasmuch as an interval of more than one year had elapsed since the last order, it was necessary, under section 216 of Act VIII of 1859, to serve the judgment-debtors with a notice, in order that they might, if they could, show cause why the decree should not be executed against them. Accordingly a notice was sent to them in a registered cover by post, they living out of the jurisdiction of the Court, but it was returned, as the judgment-debtors were not found. That was on the 2nd April 1872. The Subordinate Judge held that that was not a sufficient service upon the defendants, and ordered the case to be struck off the file of pending cases. On the 3rd May 1872 he made an order, "that a notice be sent to the judgment-debtors, by post, in a registered cover, fixing the 18th day of May as the date for showing cause, and that the case be brought forward on the said date." On the 30th May 1872, the Nazir of the Court made the following report :—" In this case a notice in the registered cover was sent by post to the judgment-debtors. The cover has been returned to-day by the post open. The cover has a slip attached thereon, in which it is written

in Hindi that Buddri Nauth, treasurer (that is one of <sup>1880</sup> the judgment-debtors) refuses to take it. Therefore, the <sup>HIRA LALL</sup> cover in question is submitted with this petition." On the <sup>v.</sup> 3rd June 1872 the case again came before the Subordinate <sup>BUDDRI DASS.</sup> Judge, upon which he made the following order: "The case <sup>\* Judgment.</sup> having been brought forward, it appears that a notice in a registered cover was sent by post to the judgment-debtor at Indore, but the judgment-debtors, not having received the cover, it was returned. The judgment-debtors not having taken the cover containing the notice, it must be considered as having been served. It is therefore ordered: 'That a report be endorsed on the decree, and made over to the decree-holder's pleader; that he may sue out execution in a competent Court, and recover the amount of his decree; and that the case be struck off the pending file.'"

Afterwards, on the 24th December 1873, upon a report of the Mohurrir that the record was not in the office, the Subordinate Judge made another order that the record should be sent for from the Judge's Court.

Subsequently on the 9th January 1874, in a proceeding, from which it appears that the record had been received and perused, the Subordinate Judge "ordered that the certificate prescribed by sections 285 and 286, Act VIII of 1859, and copy of the application for execution of decree, be sent to the agent at the Indore Cantonment." On the 9th April 1874 the case was reinstituted in the Court of the Judge by petition, stating that the Subordinate Judge had not lost control of the case until 3rd June 1872; that the decree-holders had a certificate on which they had not acted; and they prayed the Court that under section 237 certain 4 per cent promissory notes for Rs. 25,000 due to the judgment-debtors in the Indore Agency Cantonment Treasury might be attached. It appears that after some demur on the part of the Assistant Political Agent to execute the decree, he was ordered to execute it; and he did execute it by attaching a sum of Rs. 13,097, belonging to the judgment-debtors, and that money was sent to the Judge at Agra by means of a ~~man~~. On the 13th May 1876, the Judge, having received the money from the Indore Agency, ordered that the Rs. 13,097-7-9

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Judgment.

be given over to Meer Jaffar Hosein, pleader for the decree-holder, agreeably to a power given to him, and a receipt be taken from him. Before the money was handed over, however, an application was made to the Judge, which will be found at page 30 of the record, in which the defendants made the following objection, amongst others:—“(1), that the decree-holder's decree is beyond time.” Thereupon the Judge on the 18th May 1876 made the following order:—“The objections are such as may be entertained, and may possibly be determined in favour of the debtors. It appears, therefore, undesirable that the decree-holder should get the money till they have been disposed of. Let payment be stayed on the debtors giving security to pay interest at eight annas per mensem per cent. in the event of the money being ultimately awarded. If the cheque received from foreign territory have been already made over to the decree-holder, an injunction may be issued to the bank on which it is drawn not to cash it till further orders.” Then comes the decision of the 31st May 1876, by which the Judge held that the proceedings in the Court of the Subordinate Judge were *ultra vires*, and did not prevent the running of limitation. He held that the transfer of the case to the Subordinate Judge was not authorised by law, and that when the Subordinate Judge removed the case from his file he could not take it up again without a fresh transfer. He also considered that the decree-holders had not shown due diligence in the case, and doubted whether any of the proceedings were *bond fide*. He, therefore, held that he was constrained to grant the prayer of the objectors, and to award them costs.

The execution-creditors appealed to the High Court, and that Court upheld the decision. The Judges, however, stated that they saw no reason to think that the appellants had not exerted themselves *bond fide* to obtain their due. In that view their Lordships concur. But the High Court considered that the transfer to the Subordinate Judge, even if the Judge had power to make it, merely authorised him take up and dispose of the application then pending, and not the subsequent applications which were made to him. They further stated that they affirmed the order of the Judge with great reluctance.

There can be no doubt that the applications to, and orders of, the Subordinate Judge, if he had had jurisdiction, would have been sufficient to prevent the operation of the Statute of Limitation, and their Lordships are of opinion that, under the circumstances of the case, they had that effect, even if he had no jurisdiction. Section 14 of Act XIV of 1859 enacts: "In computing any period of limitation prescribed by this Act the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant or some person whom he represents *bonâ fide*, and with due diligence, in any Court of Judicature, which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled, for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from any such computation." It was, therefore, the object of the Legislature, at least with regard to the limitation for the commencement of a suit, to exclude the time during which a party to the suit may have been litigating *bonâ fide*, and with due diligence before a Judge whom he may suppose to have had jurisdiction, but who yet may not have had jurisdiction. The question is, whether the same principle may not be applied to the construction of section 20 of Act XIV of 1859 with regard to executions. Section 20 says: "No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree or order of such Court, unless some proceedings shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution." The Act does not say some proceeding in a Court having jurisdiction, and their Lordships are of opinion that a proceeding taken *bonâ fide* and with due diligence before a Judge whom the party *bonâ fide* believes, though erroneously, to have jurisdiction, especially when the Judge himself also supposes that he has jurisdiction, and deals with the case accordingly, is a proceeding to enforce the decree within the meaning of section 20.

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Judgment.



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Judgment.

In this case the Subordinate Judge did believe he had jurisdiction. Applications were made to him, and he made orders which would, if he had had jurisdiction, have been proceedings within the period of limitation. If the judgment-debtors had appeared before the Subordinate Judge, and had objected to his jurisdiction, he must have decided whether he had jurisdiction or not; and if he had decided that he had jurisdiction, even though he had not, the proceedings would have been proceedings within the meaning of section 20. They ought equally to be so, though the judgment-debtors did not appear or object to the jurisdiction.

There is one case which should be referred to, and that is the case of *Roy Dhunput Singh vs. Mudhomotte Debia*, 11 B. L. R., p. 23. There "an execution sale was stayed by consent for two months, and the execution suit was struck off the file. During that period the execution-creditor applied to the Court to restore the execution suit, and to pay to him certain moneys in deposit in Court to the credit of the judgment-debtor in another suit, alleging that he (the executing-creditor) had attached them; but it turned out that he had attached them in another suit. *Held*,—the application being *bond fide*—that the period of limitation began to run from the date of the disposal of the application by the Court." In delivering their judgment at page 31, the Judicial Committee said: "It is said that this proceeding cannot be held to be one to keep the judgment in force, because it was a petition to obtain execution of a sum of money which it was not possible that the execution could reach, and that that must have been so to the knowledge of the decree-holder. It seems to their Lordships that these circumstances really affect only the *bond fides* of the proceedings. If their Lordships could infer from these facts that the petition was a colourable one, not really with a view to obtain the money, if they could come to that conclusion, in point of fact the proceeding would not be one contemplated by the Statute; but their Lordships cannot come to that conclusion." They therefore come to the conclusion that that proceeding, although abortive, was a proceeding within the meaning of the 20th section of Act XIV of 1859.

On the whole, therefore, their Lordships have arrived at the conclusion, and will humbly advise Her Majesty that the decree of the High Court was erroneous, and that it be reversed; that in lieu thereof an order be made reversing the order of the Judge of Agra of the 31st May 1876, and ordering that the sum of Rs. 13,097-7-9, with such interest as they may be entitled to under the order of the 18th May 1876, be paid to the decreeholder; and that the appellants have the costs in all the lower courts subsequent to the petition of objection of the 18th May 1876, and the costs of this appeal.

1880

[CIVIL APPELLATE JURISDICTION.]

OODHYA PERSHAD SINGH AND OTHERS }  
(PLAINTIFFS) . . . . . } APPELLANTS;

June 10th.  
No. 64 of  
1880.

AND

JINGA PERSHAD AND OTHERS (DEFENDANTS) RESPONDENTS.

*il Procedure Code, Act X of 1877, section 2—Act XII of 1879, section 2—Court Fees Act, VII of 1870, section 12—Stamp, Rejection of plaint for insufficiency of—Appeal—“Decree.”*

Notwithstanding the provisions of section 12 of the Court Fees Act (VII of 1870) an order rejecting a plaint on the ground of its being insufficiently stamped, is appealable as a “decree” within the definition of “decree” in the Civil Procedure Code as amended by Act XII of 1879.

APPEAL from an order passed by the Subordinate Judge of A.

The main question in the case was whether an appeal lay from an order rejecting a plaint on the ground of its being insufficiently stamped.

Baboo Taruck Nath Sen, for the Appellants.

Baboo Hurry Mohun Chuckerbutty, and Baboo Chunder Madhub Sen, for the Respondent.

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GUNGA  
 PERSHAD.

*Judgment.*

PONTIFEX, J.

The judgment of the High Court (1), which was as follows, was delivered by

• PONTIFEX, J. :—

We agree with the Court below that the plaint was insufficiently stamped under article 17 of the Court Fees Act, clause 3.

Preliminary objections were taken to the appeal on the ground that the order of the lower Court was final under section 12 of the Court Fees Act, which enacts that "every question relating to valuation, for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal, shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit."

But by section 588 of the Civil Procedure Code, as it originally stood, clause (e) provided that an order under section 54, clause (b), being such an order as the present is, should be appealable, thereby removing the finality declared by section 12 of the Court Fees Act.

A second preliminary objection taken was, that although by section 588, clause (e), an appeal was given in respect of rejection of plaints under section 54, clause (b), yet under section 588 as amended no appeal is now given; but then on behalf of the appellant it was urged that under the definition of "decree" in the amended Code, an order rejecting a plaint is within the definition. Similarly the new definition of "decree" also includes questions under section 244 which were made appealable by clause (j) of section 588, as it originally stood, but which are omitted in section 588 as amended.

We think, though the amended section 588 applies only to appeals from orders directing that the plaint shall be amended and not to the rejection of a plaint, yet the amended definition of the word decree shows that an appeal lies in the present case. But although an appeal lies, we are of opinion that the decision of the lower Court is correct. The appeal will, therefore, be dismissed with costs.

(1) PONTIFEX and McDONNELL, J. J.

## [CIVIL APPELLATE JURISDICTION.]

KEDARNATH NAG (DEFENDANT.) . . . . APPELLANT ;

AND

KHETTER PAL SHIBIRUTNO AND ANOTHER }  
(PLAINTIFFS) . . . . . } RESPONDENTS.1880  
May 21<sup>st</sup>.  
No. 1329 of  
1879.*Damages for breach of covenant, Suit for—Decree for nominal damages—Equity—Limitation Act, XV of 1877, Sched. II, Arts. 32 and 120.*

Plaintiffs sued the defendant to compel him to fill up a tank excavated by him on their land, four years previously in contravention of the terms of his lease, and to restore the land to its original condition, or in the alternative to pay damages for breach of the covenants of his lease. It was found that the value of the land had been considerably enhanced by the excavation of the tank in question and by the planting of a garden round it. It was also found that the plaintiffs, or their predecessors, had stood by and allowed the defendant to improve their property without making any attempt to restrain him.

*Held*, that under the circumstances it was inequitable to require the defendant to restore the land to its original state, or to make him pay substantial damages. But that inasmuch as the plaintiffs had a right to vindicate their authority as landlords by bringing the suit, they were entitled to nominal damages and the costs of the suit.

*Held*, also that such a suit was governed, not by Art. 32, but by Art. 120, Sched. II of the Limitation Act XV of 1877.

**A**PPEAL from a decision passed by the Additional Judge of the 24-Pergunnahs, reversing the decree of the Moonsiff of Sealdah.

Baboo Sreenath Dass, and Baboo Golap Chunder Sircar, for the Appellant.

Baboo Bhyrub Chunder Banerjee, for the Respondents.

The facts of the case, and the findings of the lower Courts thereupon, sufficiently appear from the judgment of the High Court (1), which was as follows :—

The appellant in this case holds a jumma in the estate of the

(1) JACKSON and TOTTENHAM, J.J.

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 KEDARNATH  
 NAG  
 v.  
 KHETTER PAL  
 SHIBIRUTNO.

*Judgment.*

Sobha Bazar Rajah, the late Sir Radha Kant Deb, Bahadoor, of which estate the plaintiffs are trustees.

By his lease the defendant was prohibited from digging any tank in his holding without the permission of his lessor. He has, however, excavated a tank, and built a pukka ghat, converting surrounding lands into a garden. The plaintiffs brought this suit to compel him to fill up the tank and to restore the land to its original state; or should he fail to do so, to make him pay them Rs. 715 as compensation.

The defendant pleaded limitation; and further that the tank was excavated with the knowledge and permission of the former executor of the estate, who also made no objection at the time the work was done. The first Court, finding that the tank was made at least four years previous to the suit, held that the plea of limitation was established, because it thought that the suit came under article 32 of the second schedule of the Act, which prescribes two years as the period for a suit against a person for perverting property to purposes other than the specific purpose for which he has a right to use it. On the merits, the first Court held that the defendant had failed to make out that he had obtained any permission to excavate, but at the same time held that the long silence of the plaintiffs and their predecessors who had quietly allowed defendant to lay out money in improving the property, implied acquiescence on their part. It considered that in equity the plaintiffs were entitled to no relief, and dismissed the suit.

The Appellate Court was of opinion that the suit did not come under article 32 of the Limitation Act, but under article 116, which gives a period of six years. It, therefore, over-ruled the Moonsiff's decision that the suit was barred by limitation.

On the merits the Appellate Court held that the defendant had willingly broken the conditions of his lease, and that he could not be allowed to plead that he had improved the land, or that his lessors had taken no steps to restrain him at the time he made the tank. The Court gave the plaintiffs a decree, by which defendant was ordered to fill up the tank within six months, or in default to pay to plaintiffs a sum of Rs. 800.

The defendant, in this second appeal, contends that the lower

Court was wrong in over-ruling the plea of limitation; that under the circumstances the plaintiffs were not entitled after so long a period to an order for the filling up of the tank again with earth; and that at any rate no more than nominal damages should have been awarded.

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SHIBIRUTNO.

Judgment.

As to limitation we think with the lower Appellate Court that article 32 does not apply to this case. It seems to us to fall under article 120 which gives a period of six years.

But we think that the lower Appellate Court has erred in not paying regard to the equitable considerations which induced the Moonsiff to dismiss the suit. It is undeniable that the defendant was bound by his agreement not to dig a tank without permission, and it has been found as a fact that he has in this respect committed a breach of his covenant. But the lease does not provide any specific remedy to the landlord in respect of such breach, and it is for the Court to decide with regard to the circumstances what relief, if any, should be granted. The plaintiffs might probably have sued to eject the defendant for breach of the conditions of his lease; but they have elected another form of suit, in which they claim equitable relief. The question is what damage have they sustained? The first Court found that there was none; but that on the contrary the value of the land had been considerably enhanced by the defendant. It also found that the plaintiffs or their predecessors quietly stood by and allowed defendant to spend his money in improving their property without any attempt to restrain him. It further found that the suit was not brought until four years afterwards. None of these findings were displaced by the Appellate Court; but that Court considered them all to be immaterial and disregarded them. As to the delay in bringing the suit it observes that plaintiffs explain it by saying that during the greater part of the time their interests were let out in ijarah. The Court does not say that it considers their explanation sufficient or satisfactory; and it seems impossible to suppose that it could accept it as such. Be that as it may, the delay would come under consideration only after the plaintiffs had shown that they had sustained damage by the defendant's act. And in fact it is not now pretended that they have been really endamaged. This being

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so very obvious on the face of the case, we on one occasion adjourned the hearing of the appeal in the hope that the plaintiffs, respondents, would see their way to an amicable adjustment.

This, however, their pleader has represented to be impossible.

We understand from him that his clients consider it necessary to contest the case to the end, lest other tenants be encouraged to infringe the conditions of their leases should the present defendant go unpunished. We must, therefore, deal with the appeal as we think proper. The one fact found against the defendant is, that he has broken his covenant; all the other facts found are in his favor, and no substantial damage has been caused to the plaintiffs.

It would be inequitable now to require the defendant to restore the land to its original state, or to make him pay substantial damages; on the other hand it may be conceded to the plaintiffs that they had a right to vindicate their authority as landlords by bringing the suit. We think, therefore, that they ought to get nominal damages and their costs of suit.

The decrees of the lower Courts are accordingly set aside, and in their stead a decree will be given to the plaintiffs for one rupee and their costs of the lower Courts. As to the costs of this appeal, we direct that the parties pay their own costs.

## [CIVIL APPELLATE JURISDICTION.]

MULLIK AHMED ZUMMAN (PLAINTIFF) . APPELLANT;

AND

MAHOMED SAYED (JUDGMENT-DEBTOR) . . RESPONDENT.

1880  
June 9<sup>th</sup>.No. 31 of  
1880.

*Limitation—Appeal by one of several defendants against decree—Decree for costs, Execution of, against defendants who have not appealed.*

One of several defendants, jointly liable under a decree, having appealed to the District Court, the decree was reversed, but on second appeal the original decree was restored by the High Court. Under the original decree, the defendants who did not appeal were made liable for costs.

*Held*, on an application made more than three years after the date of the original decree for execution of the decree so far as it directed payment of costs, that limitation must be taken to run, not from the date of the original decree, but from the date of the decree of the High Court.

*Hur Proshad Roy vs. Enayet Hossein*, 2 C. L. R., 471, cited and distinguished.

**A**PPEAL from an order passed by the Officiating Judge of Gya, affirming that of the Subordinate Judge of that District.

In this case the decree-holder, on the 30th December 1878, filed an application for execution of a decree, passed on the 14th April 1874, so far as it directed payment of certain costs. It was objected that more than three years had elapsed since the date of the decree, and that the costs therefore could not be realized under the decree.

It appeared that the decree in question was a decree for possession with costs against three defendants. Only one of the defendants was affected by the decree so far as it directed possession to be given over to the plaintiff, and that defendant appealed to the District Court, which reversed the decree. The plaintiff then appealed to the High Court, which reversed the decision of the lower Appellate Court, and restored the original decree on the 29th June 1877.

The present application was to enforce the decree for costs



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against the original defendants, who were liable thereunder and who had not appealed.

The Subordinate Judge was of opinion that as against these judgment-debtors the decree was final on the 14th April 1874, and that limitation should be calculated as from that date, and not from the date on which the High Court restored the original decree.

The District Judge upheld the decision of the Subordinate Judge. He relied on the case of *Hur Proshaud Roy vs. Enayet Hossein*, 2 Cal. L. R., 471.

The decree-holder then appealed to the High Court.

Mr. *M. L. Sandel*, for the Appellant.

No one appeared for the Respondent.

The judgment of the High Court (1), which was as follows, was delivered by

PONTIFEX, J. PONTIFEX, J. :—

In this case there seems to have been a decree for possession *with costs* against three defendants. Inasmuch as possession was claimed by only one of the defendants, that defendant alone appealed and was successful before the Judge. But the plaintiff appealed to this Court and obtained a decree, restoring the decision of the first Court. The Judge in the Court below has relied on the case of *Hur Proshaud Roy vs. Enayet Hossein*, 2 C. L. R., 471, in which it was held that an appeal by one defendant did not prevent time from running for the purpose of executing the decree against the non-appealing defendants. The reason why in that case it was held that limitation would apply was because the appeal there was on the part only of a 10-pie shareholder of the property, leaving the decree capable of execution against the remainder of the property which could not be affected by the result of that appeal. But in the present case the appeal of the one defendant related to the whole case of the plaintiffs, and he was successful

(1) PONTIFEX and McDONNELL, J.J.,

in getting the suit dismissed by the lower Appellate Court which would have deprived the plaintiff of his right to any costs at all. In special appeal the plaintiffs succeeded in getting the Judge's decree reversed, and thereupon the original decree for costs was restored.

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We over-rule the orders of the Court below, and declare the plaintiff entitled to proceed with the execution of his decree for costs against the respondent. The appeal is allowed with costs.

[CIVIL APPELLATE JURISDICTION.]

JOYKISSEN MOOKERJEE AND ANOTHER } APPELLANTS;  
(DEFENDANTS) . . . . .

AND

ATAWUR RAHMAN (PLAINTIFF) . . . . RESPONDENT.

June 15th.

No. 1240 of  
1879.

*Review—Final order on review as to costs—Appeal—Civil Procedure Code  
(Act X of 1877), section 206.*

On the 28th July 1878, a decree was pronounced by the Subordinate Judge in favour of the plaintiff, except as to portion of his claim. Subsequently on the 3rd February 1879, the defendant applied by petition for a review of judgment on a number of grounds, and, *inter alia*, on the ground that he was entitled to costs, in proportion to the amount of the claim of the plaintiff which had been disallowed. The Court disallowed all the grounds upon which the review was sought, save that as to costs, upon which it passed the following order:—"The last ground as to proportionate costs seems to be valid. It was a clerical mistake. \* \* \* No reason was given for disallowing the costs. I allow this ground."

*Held*, that the order must be treated as a final order in the suit, and not as an order rejecting an application for review, but allowing the amendment of a clerical error, which might have been rectified under section 206 of the Code of Civil Procedure without granting the review.

**A**PPEAL from a decision passed by the District Judge of East Burdwan, dated 1st May 1879, affirming a decree of the Subordinate Judge of that district.

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 v.  
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 RAHMAN. •

Baboo *Aushotosh Mukerjee*, and Baboo *Bepro Dass Mukerjee*,  
 for the Appellants.  
 Moonshee *Mahomed Yusoof*, and Moonshee *Serajul Islam*, for  
 the Respondent.

Judgment.

The facts are set forth in the judgment of the High Court (1), which was as follows :—

This is a second appeal against the decree of the lower Appellate Court which rejected the appellants' appeal as being out of time.

It is not disputed that the first appeal was barred, unless a certain order, which was made by the Subordinate Judge of the 3rd of February 1879, ought to be treated as the final decree in the suit. On the other hand, if it ought to be so treated, the Full Bench case of *Soudamonee Dossee vs. Maharaj Dheraj Chand Bahadoor*, 6 W. R., p. 102, (miscellaneous rulings) shows that limitation runs from the date of the order, in which case the appellant would not be barred.

This order was made under the following circumstances :—

The Subordinate Judge, on the 28th July 1878, pronounced a decree in favour of the respondent (who was the plaintiff in the first Court) in respect of a portion of their claim. The appellants, who are two of the defendants in the first Court, applied to the Subordinate Judge by petition for a review of judgment, on several grounds amongst others that they were entitled to their costs in proportion to the amount of the claim of the plaintiffs which was disallowed. Notice of the application was issued to the respondent. After hearing the argument, the Subordinate Judge delivered a judgment, in which he allowed the petition, but only on the last ground as to which he says: "The last ground as to the proportionate costs seems to be valid. It was a clerical mistake. No reason was given to disallow the costs, nor was there an order disallowing the costs. I allow this ground." He then made the following order :—"That the decree be corrected. Defendants' proportionate costs to be paid by plaintiff. Costs to bear interest at 6 per cent. per annum from the date of the

(1) WHITE and MACLEAN, J.J.

original decree. Both parties shall bear their costs respectively, as I allow this petition partly and disallow the other part."

The District Judge treats the order as one rejecting the application for a review, but allowing what he considered a clerical mistake to be amended.

In passing this decision, the Judge treats the order as one rejecting the application for a review, and therefore as giving to the appellant no fresh point of departure as regards the period of limitation. This judgment runs thus :—

"The Subordinate Judge does not say very clearly what his proceeding of the 3rd of February 1879 was intended to be ; but I think it impossible, upon reading in the light of the provisions of the Code, to regard it as anything else than an order substantially rejecting the application for a review, but allowing what he considered a clerical mistake to be amended."

In passing this decision, the Judge appears to have overlooked the fact that the Subordinate Judge expressly states that he allows the appellant's petition in part, and also that by the order itself made upon the petition he corrected the decree.

The allowance of the petition was indeed on a minor ground, and there was no formal rehearing of the case after the allowance of the ground, but neither of these things affect the construction of the order.

The application, which was one for a review, was not the less the grant of the review, because it was allowed on one ground only, and that a comparatively insignificant one. It is clear also that the decree was corrected in consequence of the petition. As the Subordinate Judge had both the parties before him, and there was nothing further to be said respecting the matter as to which correction was sought, rehearing would have been a mere formality and might well be dispensed with as unnecessary. It was for this reason probably that the allowance of the petition and the amendment of the decree were embodied in one order. It perhaps might have been more regular to have made two orders instead of one, but the omission to do so would not affect the right of the appellant to treat the order as one which amended the decree in granting an application for a review. It has been argued before us that the mistake in the original decree was

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—  
*Judgment.*  
—

such as the Subordinate Judge might have amended under section 206 of the Code without granting a review of this judgment, and that the order of the 3rd February should therefore be construed as made under that section. Assuming that the decree might have been amended under that section—and I am inclined to think that it might—the answer to the argument is, that the Subordinate Judge, in making his order of the 3rd February, was not in point of fact proceeding under that section, but was dealing with an application for a review of judgment, in other words was proceeding under the review sections of the Code. It may be that the Subordinate Judge might, instead of granting the appellant's petition at all, have dismissed it and directed him to move under section 206 ; but the Subordinate Judge did not adopt that course, but chose to make the amendment in the way and manner I have mentioned. Under these circumstances the appellant is, in my opinion, entitled to have the benefit which the procedure adopted by the Subordinate Judge has given him, and to treat the order as made upon a review of judgment and therefore as the final decree in the suit.

The appeal will be allowed, and the case remanded to the lower Appellate Court, with a direction to hear the appeal and decide it upon the merits.

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## [CIVIL APPELLATE JURISDICTION.]

NOBO KUMAR MOOKHOPADHYA . . . PLAINTIFF;

AND

SIROO MULLICK . . . . . DEFENDANT.

1880  
May 16th.No. 4 of  
1880.*Bond, Limitation on suit upon registered—Limitation Act, XV of 1877,  
Schedule II, Arts. 66 and 116.—Compensation.*

Where a suit is brought to recover the principal and interest due upon a registered bond in which a day is specified for payment, the proper period of limitation is six years from the day so specified, as provided by Article 116, Schedule II of Act XV of 1877.

*Per MITTER, J.*—A suit for compensation for a breach of the conditions of a contract of the nature described in Article 66, Schedule II of the Limitation Act, falls under Article 116 and 66 according as the contract is registered or unregistered.

**T**HIS was a reference submitted for the opinion of the High Court by the Officiating Judge of the Court of Small Causes at Chooadangah.

The circumstances under which the reference was made were these :—

An action was brought upon a registered bond more than three years, but less than six, after the date on which the money became payable, for recovery of the amount of principal and interest due thereunder. The defendant admitted the execution of the bond, but pleaded that the suit was barred, inasmuch as it had been brought after the expiration of three years from the date when the money became payable.

For the plaintiff it was contended that the case fell within Article 116, Schedule II of Act XV of 1877, while the defendant urged that Article 66 applied.

The Judge of the Small Cause Court was of opinion that Article 116 governed the case.

The reasons for that opinion as stated by him were as follows :—

“It is submitted that an action for recovery of principal and interest due on a registered bond can be reduced into a case

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 MULLICK.  
Judgment.

of compensation, under Article 116 of the existing Act. There is a contract, in writing, registered. The obligee, who proceeds to sue for recovery of his money, as much complains of a breach of contract as any other contractee. And the interest recoverable by the obligee is essentially the compensation which he is entitled to for the use and application of his money by the obligor. That interest is. one species of compensation has been admitted by the celebrated jurists of the world, and their opinion has been accepted by Courts of Justice. I may refer to the remark of Mr. Justice MARKBY in the case of *Omda Khanum vs. Brijendro Koomar Roy Chowdhry*, 12 B. L. R., 468, in which his Lordship is reported to have said, 'but *prima facie*, the word 'interest' imports not a penalty for breach of contract, but a return for the use of money and a compensation to the borrower for his risk in lending the money.' If interest be only a kind of compensation, it falls directly within the purview of Article 116."

The following judgments were delivered by the High Court (1) :—

GARTH, C.J. GARTH, C.J. :—

I confess that I have considerable doubt as to the correctness of the judgment of the Court below; but as my learned colleague thinks that the judgment is right, and as I find that on the Original Side of the Court it has been held by Mr. Justice WILSON that under the Act of 1877 six years is the proper period of limitation in the case of a registered bond, I am unwilling, where the meaning of the Legislature is really doubtful, to divide the Court upon a question of limitation.

In one sense, of course, every suit for a breach of contract is a suit for compensation; but I should have thought that in ordinary legal parlance, a suit to recover money due upon a bond (specially having regard to the force of a single bond in this country) would be a suit for a debt, or sum certain; whilst, on the other hand, a suit for compensation for breach of contract (Article 116), meant a suit for unliquidated damages.

(1) GARTH, C.J., and MITTER, J.

But there is no doubt that under the Acts of 1859 and 1871 the period of limitation in the case of a bond or other contract in writing registered was six years; and that the people of this country have, for years past, understood that an unregistered bond must be sued upon within three years, and a registered bond within six years.

Unless, therefore, it appears clear from the Act of 1877 that the Legislature intended to change the period of limitation from six to three years in the case of a registered bond, I think that it would be unfair to persons, placed in the position of the plaintiff, to oblige them to sue within the shorter period; and as not only the Judge in the Court below, but also learned Judges of this Court, have satisfied themselves that a suit upon a bond is, properly speaking, a suit for compensation for breach of contract. I do not think it right, in the interests of justice, to press the opposite view.

MITTER, J. :—

I am of opinion that the plaintiff's claim in this case is not barred by limitation. I think the case comes within Article 116, Schedule II, of the Limitation Act of 1877. Article 66 is not applicable. It is true that the suit is "on a single bond where a day is specified for payment," but the bond, the basis of the suit, being registered, and the claim (for reasons which I shall presently state) being for compensation for the breach of the stipulated condition of payment, the suit falls under Article 116. In this article, under the head "time from which period begins to run," it is enacted that "the period of limitation would begin to run against a suit brought in a similar contract not registered." Having regard to the words, "*a similar contract not registered*," it seems to me that a suit for compensation for a breach of the conditions of a contract of the nature described in Article 66, would fall under Articles 116 or 66, respectively, according as the contract is registered or unregistered.

It seems to me that when a party to a contract commits a breach of its conditions, the aggrieved party has either of the two alternative civil remedies. He may either bring a suit for

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specific performance or for compensation. A suit for specific performance, by reason of the specified time for payment having already elapsed, has become impossible in this case.

This suit therefore falls under Article 116, and is not barred.

[CIVIL APPELLATE JURISDICTION.]

July

BULDEO DOSS . . . . .

AND

HOWE . . . . .

*Contract Act (IX of 1872), sections 55 and 107—Ascertained goods, Contract for Sale of—Time, Essence of contract.*

A contract for the sale of ascertained goods having been made on the terms: "cash on delivery, to be given and taken in ten or eleven days," the vendee obtained an extension of time for the performance of his part of the contract, agreeing in the meantime to pay godown rent and interest. Within the time so extended he took delivery of, and paid for portion of the goods, and subsequently obtained a further extension of time. He was unable to take delivery during this further extended time, but shortly after it expired, he tendered the price of the remaining portion of the goods, and demanded delivery from the vendors, who stated that they had rescinded the contract. Thereupon the vendee brought an action for damage for non-delivery. *Held*, that time was of the essence of the contract, and that under section 55 of the Contract Act (IX of 1877), the vendors were entitled to rescind.

**T**HIS was a reference under section 7 of Act IX of 1850 submitted by the Chief Judge of the Small Cause Court under the following circumstances:—

On the 8th August 1879 the defendants sold fifty chests of shellac to Messrs. Fornaro Brothers. The contract was by bought and sold notes, and the terms were "cash on delivery," which was to be given and taken in ten or eleven days at buyers' option. Messrs. Fornaro Brothers transferred the contract to the plaintiff. At the expiration of the period mentioned for delivery, the plaintiff, at the request of the defendants, agreeing to pay godown rent and interest on the purchase money, on the 26th of September the plaintiff took delivery of, and paid for, twenty

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Reference.

chests of shellac. A small balance (not sufficient to cover the price of one chest) remained in the defendants' hands after deducting the price of the twenty chests, godown rent, and interest, and the following receipt was granted: "Calcutta, 26th September 1879. Received of Baboo Buldeo Doss Chutterbhooj, on account of their purchase of 50 cases shellac, through Messrs. Fornaro Brothers, the sum of Rs. 1,130 only." This delivery the learned First Judge found not to be a delivery of part of the goods in progress of the delivery of the whole. On the 4th or 5th October the plaintiff obtained a further extension of time for one week, bringing the period of delivery to the 12th October. On the 25th or 27th of October the plaintiff tendered the price of the remaining thirty cases to the defendants, and asked for delivery, but the defendants stated that they considered the contract to be at an end.

The learned First Judge found that the sale was of ascertained goods, and being of opinion that under section 55 of the Contract Act the plaintiff could not recover, directed judgment to be entered up for the defendants. A new trial was subsequently granted, and the case was referred for the opinion of the High Court, upon the following question: "Whether on the facts, as found, the defendants were entitled to refuse delivery of the goods on the 25th or 27th October?"

The learned Judges, after stating that in their opinion their decision must be based on the Indian Contract Act only and not on the English law, and referring to the judgment of COUCH, C.J., in *Greenwood vs. Holquette*, 12 B. L. R., 42, as an authority for that conclusion, continued as follows:— "Under sections 77 and 78 of the Indian Contract Act, 1872, this being a sale of ascertained goods, the property passes to the buyer, and until something further is done it remains so. But we must look at the Act as a whole, and not refer to certain sections only for the purpose of decision, and section 55 appears to qualify the law as expressed in sections 77 and 78. Section 55 says:— "When a party to a contract promises to do a certain thing at, or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes

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voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract." Here time was of the essence of the contract. The plaintiff had agreed to pay for, and take delivery of, the goods within a specified time, viz., the 12th October. This he failed to do, and the defendants accordingly, at their option, rendered the contract void. The section, which is a departure from the English law, draws no distinction between ascertained and unascertained goods, but it gives the right to the promisee, even we take it in the case of ascertained goods, to say that in consequence of the breach he is entitled to treat the goods as if they had never passed as the property of the buyer. It has been urged before us that the remedy given to the seller is to resell the goods under section 107, but this course is not obligatory on the seller, nor does it in any way interfere with the provisions of section 55. We think, therefore, that the defendants, in consequence of the breach on the part of the plaintiff, are entitled to a judgment, and it is worthy of remark that the view adopted by us is the same as that taken by the various commentators on the Indian Contract Act."

*Agnew* (for the plaintiff)—This was a sale of ascertained goods. There has been a part payment of the price, and a part only, and the property in the goods has, according to both English and Indian law, passed to the plaintiff—*Martindale vs. Smith*, 1 Q. B., 389.

The Contract Act gives an unpaid vendor of ascertained goods certain remedies. He has his lien under sections 95 to 98 of the Contract Act so long as the goods remain in his possession, or he may resell under section 107. If the goods are in the course of transit to the purchaser, the vendor may stop them under sections 99 to 106. These remedies correspond with the remedies which an unpaid vendor has under English law. The defendants ought to have tendered the goods to the plaintiff, and then if the plaintiff refused to pay the price, they would have been entitled to have exercised their rights as unpaid vendors. Default in payment of the price is not such a breach as will entitle a vendor to rescind. In *Martindale vs. Smith*, 1 Q. B., 389, Lord DENMAN, C.J., says:—"Having taken time to consider our judgment owing to the

doubt raised by a most ingenious argument whether the vendor has not a right to treat the sale at an end, and reinvest the property in himself by reason of the vendor's failure to pay the price at the appointed time, we are clearly of opinion that he had no such right, and that the action (which was one for trover) is well brought against him. For the sale of a specified chattel on credit, though the credit may be limited to a definite ground, transfers the property in the goods to the vendee, giving the creditor a right of action for the price, and a lien upon the goods if they remain in his possession until that price be paid. But the default of payment does not rescind the contract."

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In *Sooltan Chund vs. Schiller*, I. L. R., 4 Cal., 252, it was held that default in payment of the price could not authorise the vendees to rescind the contract under section 53. Suppose the goods had been destroyed in any way after the 12th October, and before the plaintiff tendered the price, he would have been liable for the loss as the property or the goods had passed to him—Contract Act, section 86, *Shoshi Mohun Paul Chowdhry vs. Nobo Krishto Poddar*, I. L. R., 4 Cal., 801.

Section 55 does not apply to the case of a sale of ascertained goods, but to sales of specific chattels, conditionally, as where the vendor is to do something to the goods before delivery, or where the goods are to be tested, or weighed, or measured. The thing to be done must be in the nature of a condition precedent—*Simpson vs. Crippen*, L. R., 8 Q. B., 14. But even if section 55 does apply to a sale of ascertained goods, time was not of the essence of the contract. In order that time may be of the essence of the contract, it must go to the very root of the consideration, and there must be a direct stipulation or necessary implication to that effect.

The "intention of the parties" must be the intention of both parties—not of one only. It clearly was not the intention of the plaintiff that the contract should be at an end if he did not pay the price on the 12th October. He had agreed to pay godown rent and interest, and the bargain was an advantageous one for him; besides he afterwards urged and demanded compliance with the contract, thereby showing that he did not understand it to be at an end.

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 BULDERO Doss Even if the vendors had the right to rescind, they should have  
 v. given notice of their intention. In rescinding as in making a  
 contract both parties must concur—*Franklin vs. Mills*, 4 A. and  
 HOWE. E., 599.  
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*Allen* (for the defendants).—English law does not apply in this case. It must be governed by the Contract Act. There is nothing in the Act to show that section 55 is not to apply to contracts for the sale of ascertained goods, and the section itself is wide enough to include such contracts. The effect of extending the time for delivery was to make it of the essence of the contract that the delivery should be taken not later than 12th October. The case of *Sooltan Chund vs. Schiller*, I. L. R., 4 Cal., 252, does not apply. The contract there was not for the sale of ascertained goods, nor was time of the essence of the contract. The case of *Shoshi Mohun Paul Chowdhry vs. Nobo Krishto Poddar*, I. L. R., 4 Cal., 801, merely asserts the proposition laid down by the Contract Act.

The following judgments were delivered by the Court (1):—

GARTH, C.J. GARTH, C.J.:—

I think that under the circumstances the defendants were justified in refusing delivery of the goods. It has been contended that as the goods were ascertained, and the time for their delivery, and for payment of the price, had been postponed, the property in them had passed to the plaintiff (see section 78 of the Contract Act); and that consequently the defendant's only remedy was to resell them, after notice to the buyer, under section 107 of the same Act. Now that section is headed "Resale," and it provides under what circumstances the vendor of ascertained goods has a right to resell them. But that is not the vendor's only remedy; and I can see no reason why section 55, which provides for the rescission of contracts in certain events, should not apply to the present case.

We are bound, I think, to determine questions of this kind, so far as we can, by reference to the Contract Act and not to English law; and sections 51 to 58 appear to contain general

(1) GARTH, C.J., and PONTIFEX, J.

visions which are applicable to all cases of reciprocal promises.

In this case, whether the property in the goods had passed or not, the parties had undoubtedly reciprocally promised the plaintiff to pay the price, and the defendant to deliver the goods, at a given day, and it is found by the Court below that time was of the essence of the contract. In such a case section 55 provides that if the buyer is not ready and willing to pay the price at the time agreed upon, the seller has a right to rescind the contract, and to refuse to deliver the goods, and I consider that upon the rescission the property in the goods sold reverted to the sellers. It has been contended, that the surplus money paid to the defendants on the occasion of the delivery of the first 20 chests, was a part payment of the price of the remaining chests, which prevented the application of section 55. But it has been found as a fact by the lower Court, that the delivery of the 20 chests was not "a delivery of part of the goods in progress of delivery of the whole." And whether this was so or not, I do not see why section 55 should not apply, the plaintiff having the right, of course, upon the rescission of the contract, to receive back the small balance due to him from the defendants. I think therefore that the judgment of the Court below should be confirmed, and that the plaintiff should pay the costs of this reference.

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BULDERO DOSS

HOWE.

Judgment.

GARTH, C.J.

PORTIFFEX, J.:—

PORTIFFEX, J.

I think that under the circumstances stated the defendants have a right to rescind and refuse delivery. The facts of the case having been given, and the plaintiff having refused to pay godown rent for such further time, show, in my opinion, that time was of the essence of the amended contract, and brings the case within section 55 of the Contract Act; but it is said that section 55 applies only to contracts where the property in the goods sold does not pass to the buyer; that here the facts were ascertained, and by the proper construction of the contract the property in them passed to the plaintiff, and that section 107 declares the remedy of the vendor under such circumstances.

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No doubt section 107 declares one remedy, but it is only a partial remedy, for the purchaser might be insolvent and the market depressed, in which case it would be small satisfaction for the vendor to resell. Besides section 55 contains in itself the words, "or so much of it as has not been performed," which in my opinion show that it was intended to apply to cases where the property in the goods passed by the contract as much as to contracts where the property did not pass. And section 39 contains similar words.

If there had been any machinery for the purpose in the Small Cause Court procedure, the defendants ought to have paid the small balance in their hands into Court as there was no such machinery; and as the same is insignificant in amount, I think that it ought to be disregarded, though of course the defendants are liable to repay it to the plaintiff.

[CIVIL APPELLATE JURISDICTION.]

July 19th. CHATU MISSER (DEFENDANT) . . . . . APPELLANT;  
 AND  
 No. 358 of 1879. JEEVA MISSER AND OTHERS (PLAINTIFFS) . . RESPONDENTS.

*Declaratory Decree—Reversionary heirs, Suit by, to restrain widow from committing waste—Waste.*

Plaintiffs, who were the presumptive heirs in reversion of P., sued to set aside certain alienations made by his widow on the ground that such alienations had been made without any legal or justifying necessity, and to prevent the widow from committing waste of the properties in her possession as widow of her late husband.

*Held*, that the suit would lie.

*Shevaganga* case, L. R. 2 I. A, 169 cited; *Thakoorain Sahiba vs. Mohun Lal*, 7 W. R., (P.C.) 25., followed.

**A**PPEAL from a decision passed by the Additional Subordinate Judge of Sarun, reversing the decree of the Moonsiff of Parsa.

In this case the plaintiffs sued as reversionary heirs of one Pertab Misser, deceased, for a declaration of their rights as such reversionary heirs, and to set aside certain alienations of por-

tions of his estate by his widow, on the ground that such alienations had been made without any legal or justifying necessity, and to prevent the widow from committing waste of the properties in her possession as the widow of her late husband.

The Court of first instance dismissed the suit, on the ground that it was not maintainable during the widow's lifetime.

The lower Appellate Court found that there had been no necessity for the alienations in question, and gave a decree declaring that, in the event of the plaintiffs surviving the widow, the alienation should not be considered valid as against them.

Against this decree one of the defendants preferred this appeal to the High Court.

Baboo Huri Mohun Chuckerbutty, and Baboo Jodu Nath Sahai, for the Appellant.

Mr. M. L. Sandel, and Mr. C. Gregory, for the Respondents.

The following judgment of the High Court (1) was delivered by

GARTH, C.J. :—

GARTH, C.J.

I think that the lower Appellate Court has taken a right view of this case.

The object of the plaintiffs' suit was to obtain a declaration, that they were the reversionary heirs of Pertab Misser to the property in question, and that the mortgage of that property to the appellant (the defendant No. 2), by the widow of Pertab Misser (the defendant No. 1), was void, as having been made without any legal necessity.

The first Court, without going into the question of legal necessity, dismissed the suit, on the ground that the plaintiffs, though presumptively the heirs of Pertab Misser, had no right to set aside the mortgage during the widow's lifetime, because their interest in the property was only contingent upon their surviving her.

The lower Appellate Court held :—

*First.*—That, as the plaintiff's interest was only contingent, no present declaration of their title could be made.

(1) GARTH, C.J., and MITTER, J.

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MISSER.  
—  
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MINER

Judgment.

GARRE, C.J.

*Secondly.*—That as a matter of fact there was no legal necessity for the mortgage by the widow.

*Thirdly.*—That the plaintiffs were, therefore, entitled to a decree, declaring that the mortgage was invalid against them after the widow's death.

In this Court it has been argued by the appellant, that according to the rule laid down by the Privy Council in the *Shivagunga* case, (L. R., 2 Ind. Appeals, 169) the plaintiffs were not entitled to the decree which the lower Court has given them; that their interest being only contingent the Court could make no declaration of title in their favour; and that the decree, which they have obtained, is not one which can give them any consequential relief in this or any other suit.

It appears to me, however, that this is one of that class of cases which are alluded to in the *Shivagunga* case, as being exceptions to the general rule which is there laid down.

In page 191 of the judgment, their Lordships allude to suits, brought against Hindu widows by presumptive reversioners to restrain waste and the like, as being "*suits of a very special class, which have been entertained by the Courts ex necessitate rei.*" They expressly say that in such cases the reversioner cannot get a declaration of his own title as against third persons; but he is permitted to sue as a presumptive heir, because, unless he were allowed to bring such a suit, there would be no means of preventing the widow from doing perhaps irreparable mischief to the estate.

And suits like the present, it seems to me, come clearly within the principle of that exception.

It was held by the Privy Council in the case of *Thakoorain Sahiba vs. Mohun Lal* (7 W. R., P.C., 25), that suits of this kind would lie "upon the ground of the necessity that the contingent reversioner may be under of protecting his contingent interest."

Unless such a suit could be brought, it might be impossible, if the widow lived to a great age, to bring evidence after her death to prove that there was no legal necessity for alienations which she may have made when a young woman; and it is for

this reason, namely the probability of failure of evidence through lapse of time, that the right to bring these suits has been constantly upheld by this Court. (See the Full Bench case of *Gobind Monee Dossee vs. Sham Loll Bysack*, Sp. No. W. R., 165; *Behari Lall Meherwar vs. Modho Lall Gywal*, 21 W. R., 430; *Lalla Chuttur Narain vs. Wooma Koonwaree*, 8 W. R., 273; and *Kamikaprasad Roy vs. Sreemuttee Jagadamba Dossee*, 5 B. L. R. 508).

I think, therefore, that the lower Appellate Court was quite right, and that this appeal should be dismissed with costs.

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March 5th.

## [PRIVY COUNCIL.]

GOUR CHUNDER ROY . . . . . APPELLANT;

AND

PROTAP CHUNDER DASS . . . . . RESPONDENT.

*Principal and surety—Surety, Discharge of, Contract Act (IX of 1872) section 135—Interest, Acceptance of, in advance.*

Although as a general rule the acceptance of interest in advance by, the creditor does operate as a giving of time to the principal debtor, and consequently as a discharge of the surety, yet where the surety knows of and consents to the advance interest being taken, he will not be discharged from liability.

Judgment of the High Court, reported in 2 Cal. L. R., 455—*Protap Chunder Dass vs. Gour Chunder Roy*—affirmed.

THIS was an appeal from a decision passed by a Division Bench (GARTH, C.J., and McDONELL, J.) of the High Court of Calcutta on the 16th May 1878.

The judgment of the Division Bench is reported in 2 C. L. R., 455, and there the facts will be found fully stated.

*Cowie, Q.C.*, and *Doyne*, for the Appellant.

*Leith, Q.C.*, and *Graham*, for the Respondent.

Their Lordships of the Judicial Committee (1), in affirming the decision of the lower Court, delivered the following judgment:—

Accepting the facts found by both the Courts in India, their Lordships agree with the High Court that the liability of the

(1) Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

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 DAS.

*Judgment.*

appellant, as accommodation acceptor of the hundis, depends on the answer to be given to the question whether he knew of and consented to the advance interest being taken. The High Court has answered the question in the affirmative, and their Lordships entirely agree in that conclusion. Monohur Laha's evidence alone is sufficient to establish the fact that the defendant did know of, and consent to, the payment of the advance interest; and he was a witness called by the appellant. Nor do their Lordships think that the testimony of the witnesses adduced by the plaintiff is, though exceptions may be taken to parts of it, altogether inconsistent, as has been argued, with that of Monohur Laha. That which relates to a conversation between the plaintiff and defendant in the billiard room of the former, upon which there was no cross-examination, is quite consistent with all that Monohur Laha has deposed to. Again, the probabilities of the case appear to their Lordships to be all in favour of the conclusion of the High Court. Pogose, the drawer of the hundis, and the party primarily liable upon them, was absent from his place of business; his affairs were evidently in a very shaky condition; and, although it was possible that when he came back again he might be able to make some arrangement for the payment of the hundis, he had no present means of meeting them. In these circumstances it is hardly conceivable that the plaintiff would enter into a transaction, the effect of which would be to relieve the only solvent party from liability upon the hundis. On the other hand, it was much to the interest of the defendant to take the chance of the re-establishment of Pogose's credit, and therefore to assent to such an arrangement as was actually made.

Their Lordships, therefore, will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

## [PRIVY COUNCIL.]

LEKRAJ KUAR . . . . . APPELLANT;

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Nov. 25<sup>th</sup>.

AND

MAHPAL SINGH . . . . . RESPONDENT.

*Evidence Act, I of 1872, sections 35, 48, and 49—Custom of inheritance—  
Regulation VII of 1822, Records made under.*

Under Regulation VII of 1822, which directed that certain officers of Government should ascertain and record "the fullest information in regard to landed tenures, the rights, interest and privilege of the various classes of the agricultural community," and that "their proceedings should embrace the formation of as accurate a record as possible of all local usages connected with landed tenures," extracts from *Wajibularz* or village administration papers, and statements of the proprietors of villages showing that, in a particular clan, daughters were excluded by the custom of the clan from succeeding to the inheritance of their father's estate, were recorded and duly authenticated by the proper officers.

*Held*, that the records containing such extracts and statements were admissible in evidence under section 35 of the Evidence Act.

*Quære*.—Whether such records were not also admissible in evidence under section 48 or section 49 of the same Act.

*Dabee Dut vs. Sheikh Emit Ali*, 2 N. W. P. H. C. R., 395, cited.

**I**N this case there were two consolidated appeals from decisions passed by the Commissioner of Lucknow and the Judicial Commissioner of Oudh, respectively.

*Leith, Q.C., Cowie, Q.C., and Doyne*, for the Appellant.  
*Graham, and T. Thomas*, for the Respondent.

The facts, so far as they are necessary for the purpose of this report, are stated in the judgment of the Judicial Committee (1), of the Privy Council, which was as follows:—

The question in this appeal is whether the plaintiff, Baboo

(1) Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.

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*Judgment.*

MAHPAL Singh, or one of the defendants, Rani Rughubuns Kuar, is entitled as the next heir to Udit Pertab Singh, one of the talookdars of Oudh, to the talook of Surjpur, and another talook of which Udit Pertab Singh died possessed. Udit died without male issue, leaving a widow, since deceased, and an only daughter, the defendant Rughubuns. The plaintiff is the nearest male relation of the deceased talookdar, standing in the position of first cousin once removed. On the death of Udit Pertab Singh, his widow Subbraj was put into possession of the talooks in dispute; but under a compromise with Rani Lekraj Kuar, the step-mother of the deceased talookdar, the possession was given up to Rani Lekraj. That was the state of things when the present plaint was brought, and Rani Lekraj Kuar was alone made the defendant. The first judgment in the case was given by the Deputy Commissioner when the record was in this state. On an appeal from his judgment the Commissioner directed that the daughter, Rani Rughubuns Kuar, should be joined as a defendant, and remanded the case to the Deputy Commissioner, directing a new issue, which was necessary in consequence of her being brought into the suit. That issue in substance was, whether the plaintiff or the daughter was the next heir to Udit Pertab Singh, and entitled to succeed to his estate. There can be no doubt that by the general Hindu law, which would prevail in the absence of any special custom, the daughter would have been entitled to the inheritance of her sonless father. The question which is raised in the cause, and by the issue which was joined after Rughubuns had become a defendant on the record, is whether in the Bahrulia clan, to which this family belongs, a custom exists to exclude daughters from succeeding to the inheritance of their father's estate.

Other questions were raised in the suit, but the only question which remains to be determined is, whether the evidence which was given by the plaintiff to support that custom was properly admissible? This evidence consists of a number of *Wajibulars* or village administration papers, which state, in a manner which will be hereafter adverted to, a custom to the effect that daughters are excluded from inheritance in the Bahrulia clan. There is no doubt, that if those papers are properly admissible in evidence as

proof of the custom, Rughubans, the daughter, would be excluded by the custom stated in them. These *Wajibularz*, or village papers, are regarded as of great importance by the Government. They were directed to be made by Regulation VII of 1822, and it may be as well to read the language of it before adverting to the objections which have been taken to the reception of the papers in the present suit. The 9th section is: "It shall be the duty of collectors, and other persons exercising the powers of collectors, on the occasion of making or revising settlements of the land-revenue, to unite with the adjustment of the assessment and the investigation of the extent and produce of the lands, the object of ascertaining and recording the fullest possible information in regard to landed tenures, the rights, interest, and privileges of the various classes of the agricultural community. For this purpose their proceedings shall embrace the formation of as accurate a record as possible of all local usages connected with landed tenures, as full as practicable a specification of all persons enjoying the possession and property of the soil, or vested with any heritable or transferable interest in the land;" and other purposes are referred to in this section. Then in the latter part of it there occurs this passage: "The information collected on the above points shall be so arranged and recorded as to admit of immediate reference hereafter by the Courts of Judicature." It is stated by the Judicial Commissioner that officers in administering the province of Oudh, were directed to be guided by the spirit of this amongst other resolutions.

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The papers which are objected to were offered in evidence and received by the Courts under the 35th section of the Indian Evidence Act, 1872. The section is this: "An entry in any public or other official book, register, or record stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country, in which such book, register, or record is kept, is itself a relevant fact."

The manner in which these village papers were made up with respect to the custom appears to be that the officer recorded the statements of persons who were connected with the villages in

1879 the pergunnah in which this talook is situate. Some of the persons, whose statements were taken, were the proprietors of villages in the talook; others appear to be the proprietors of villages not in the talook, but in the pergunnah. The record contains translations of the *Wajibularz*, but not of the whole contents of the papers. Extracts from them only are printed, and these extracts show that the persons giving the information made statements which are contained in paragraph 4, declaring the existence of the custom in question. These documents are entered for record in the office, and they must be taken upon the evidence to have been regularly entered and kept there as authentic *Wajibularz* papers. The objections which were taken to their reception are stated in the judgment of the Judicial Commissioner, and are these: "Exception was taken to these documents on the part of the daughter, on the ground that they were not prepared or attested by the Settlement Officer in person as required by Regulation VII of 1822, and that they relate to matters which the Settlement Officer had no jurisdiction to include in them." Those are the only objections which were stated by the Judicial Commissioner to have been made. A further objection, which was relied on by Mr. Cowie, appears also to have been taken by the daughter in the course of the proceedings, viz., that she was not bound by the statements in question, inasmuch as she was no party to the making up of the *Wajibularz*. Before dealing with these objections, it will be convenient to refer to what the Commissioner says of the documents. He says: "These are official records of admitted customs, all properly attested." It must, therefore, be taken that they are official records kept in the archives of the office, and that they are authenticated by the signatures of the officers who made them, that being what their Lordships understand, from the statement of the Commissioner, that they are all properly attested.

The first objection—and the one most relied upon—is that these papers were not prepared or attested by the Settlement Officer in person. We have no precise information of the manner in which the regulations were directed to be of force in Oudh, but the Judicial Commissioner, as already mentioned, says: "Officers in administering the province were directed to be guided by the

spirit of this amongst other Regulations, but they were not tied down to its exact text." It is plain that they could not be so tied down, because the Regulation in question refers to collectors, and there are no collectors in the province of Oudh. Therefore in applying this Regulation in its spirit, we must substitute for collectors and their subordinates the persons who were performing the duties which would have fallen upon collectors in the parts of India to which the Regulation originally applied. These would be the Settlement Officers, or those subordinate to the Settlement Officers, who were employed in making or revising the settlements. The words of the Regulation are: "It shall be the duty of collectors and other officers exercising the powers of collectors, on the occasion of making or revising settlements of the land-revenue," to make up the papers. When documents are found to be recorded as being properly made up, and when they are found to be acted upon as authentic records, the rule of law is to presume that everything had been rightly done in their preparation unless the contrary appears. Upon this objection the Judicial Commissioner makes the following observation: "The mere fact then that the settlements records of this province were prepared and attested by officers subordinate to the Settlement Officers, and not by the Settlement Officer in person, cannot be accepted as in any way invalidating the records themselves." He was of opinion that the officers who obtained this information, and who attested the record of what they had obtained, were officers subordinate to the Settlement Officer, and this being so, their Lordships think that the Judicial Commissioner was right in holding that the *Wajibularz* were prepared by the proper officers, and that this first objection ought not to prevail.

If then these documents were made by proper officers, is there any valid objection to receiving in evidence the information which they record? The objection taken and referred to by the Judicial Commissioner does not very precisely hit the point which has been argued at the bar. He says: "The objection was that they," that is, the administration papers, "relate to matters which the Settlement Officer had no jurisdiction to include in them." That objection seems to their Lordships to be unfounded. The officers

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who were to make the inquiries were directed to ascertain and record "the fullest possible information in regard to landed tenures, the rights, interests, and privileges of the various classes of the agricultural community. For this purpose their proceedings shall embrace the formation of as accurate a record as possible of all local usages connected with landed tenures." This custom of the Bahrulia clan relating to the mode of inheritance in the clan seems clearly to be a usage of the kind which the Regulation requires the officer to ascertain and record.

The objection which has been argued is, that the papers upon the face of them do not show that the officers had passed any judgment upon the information they received, and contain no record of their opinions or findings upon them. It is true that no express statement of the opinion or finding of the officers appears upon the papers, but their Lordships think that the fact that the officers recorded these statements, and attested them by their signature, amounts to an acknowledgment by them that the information they contained was worthy of credit; and gave a true description of the custom. Suppose the papers had had a heading such as the following:—"The usages of the Bahrulia clan appear in the information recorded below." This would, undoubtedly, be an expression by the officer of his opinion that the statements contained a correct description of the custom. Then, when we find that the statements are recorded and authenticated in the manner that has been mentioned, and placed in the Government Records. Ought it not to be implied that the officer has in effect affirmed that the information embodied in the recorded statements was true, and described an existing custom? Their Lordships think that such an implication may in this case be properly made.

The Indian Evidence Act has repealed all rules of evidence not contained in any statute or regulations, and the plaintiff must therefore show that these papers are admissible under some provision of the Indian Evidence Act. That relied on is the 35th section, which has been already read. It is necessary to look at the precise terms of this section, and for the present purpose it may be read: "An entry in any official record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, is itself a relevant fact." There can be no doubt

that the entries in question, supposing them to bear the construction already given to them, state a relevant fact, if not the very fact in issue, viz., the usage of the Bahrulia clan. If so, then the entry having stated that relevant fact, the entry itself becomes by force of the section a relevant fact, that is to say, it may be given in evidence as a relevant fact, because, being made by a public officer, it contains an entry of a fact which is relevant.

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There is another ground upon which it is said that these entries would be admissible. Supposing that these papers were not to be treated as records themselves describing the customs, but as recording only the opinions of persons likely to know it, the 48th section would appear in that view of the entries to make them admissible. The 48th section is: "When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence, if it existed, are relevant." Then if opinions of this nature were relevant, the entry of such opinions in an official record is itself a relevant fact which makes the entry admissible. There may be doubt whether what for the present purpose are assumed to be opinions would fall under the 48th clause or the 49th, which is as follows, and refers to family usages: "When the Court has to form an opinion as to the usages and tenets of any body of men or family, the opinions of persons having special means of knowledge therein are relevant facts." It is enough for their Lordships, without giving an opinion on this last ground, to rest their decision as to the admissibility of the entries on the first ground. Placing the admissibility of the papers on this ground the Evidence Act does not appear to have altered the law with regard to papers of this description, for it had been decided by the High Court of the North-Western Provinces that *Wajibularz* papers, being a record of rights made by a public servant, were admissible in evidence and entitled to weight in proof of village customs. That case is found in the 2nd volume of the North-Western Provinces High Court Reports, page 397—*Dabee Dut vs. Sheikh Emit Ali*.

On the part of the daughter it was objected that being no party to the making up of the papers, she was not bound by the state-

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ments in them. She is, no doubt, not bound in the sense of being concluded by them. They do not in any way estop her from asserting her right, or disputing the custom which is stated in them. They are only received as evidence, and are open to be answered, and the statements in them may be rebutted. No evidence, however, was given on the part of either of these defendants to show that the custom did not exist, and their Lordships cannot but observe that, if the custom did not exist, nothing could have been easier than to obtain proof of descents and succession to property, which would negative it. It appears that there are numerous villages in this talook, and more in the pergunnah: the Bahrulia clan is a large one, and if the custom did not exist, the defendants must have had means, to be obtained without difficulty, of disproving it.

Their Lordships therefore, think, that these administration papers were properly admitted in evidence; that the objections made to their reception have failed; and that being so, it is not disputed that they contain full proof of this custom.

Their Lordships are of opinion that the judgments of the Court below are right, and they will humbly advise Her Majesty to affirm them and to dismiss the appeal with costs.



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 A plaintiff, who has been unable to file a suit  
 under the Rent Act, on the last day of the  
 period of limitation allowed by that Act,  
 by reason of that being a close holiday,  
 cannot be allowed to file his suit on the following  
 day. Cf. PURBAN CHUNDER GHOSH *vs.* MUTTY  
 LALL GHOSH, 2 C. L. R., 504. WOOMESH  
 CHUNDER BOSE *vs.* SUBJU KANTO ROY CHOW-  
 DREY ... 49

— section 27—*Suit for  
 declaration of liability to pay less rent than  
 fixed by pottah—Equitable Relief—Limitation  
 —Abatement of rent.*] A suit by a tenant  
 against his original lessors for a declaration that  
 he is not liable to pay them the whole rent  
 payable under his pottah, in consequence of a  
 third person having, subsequently to the grant  
 of such pottah by suit, established a right to a  
 share of the rent, is not a suit for abatement  
 under Act VIII (B.C.) of 1869, and, therefore,  
 not subject to the rule of limitation prescribed  
 by section 27 of that Act. Where, under such  
 circumstances, the tenant is holding more land  
 than is covered by his pottah, it is not necessary  
 that his landlords, if desirous of enhancing the  
 rent, should be referred to a separate suit for  
 that purpose. The suit of the tenant being

**Act—continued.**

for equitable relief, the claim of the landlords must be taken into consideration in determining what relief the plaintiff is entitled to obtain. *CHANDMONI DAS vs. LOKE NATH CHATTERJI* ... 494

— XI of 1865, section 28—*Regulation XIX of 1873, sections 6, 9 and 10—Limitation.* In a suit in a Civil Court a decree was obtained in 1863, declaring the land of the defendant "to be resumed and subject to assessment of revenue, the amount to be fixed by the Collector." *Held*, that the decree was conclusive; that the lands were not considered *mâl* at the time of the settlement in 1790; and, further, that their resumption did not create a tenancy, and that, therefore, section 28 of Act VIII (B.C.) of 1869 did not apply. *A. J. FORBES vs. BHUJLOO ROY* ... 301

— section 52. See PRACTICE ... 239

— *Resumption proceedings under—Parties—Limitation—Lakhiraj Title—Specific Relief Act, I of 1877, section 42—Declaratory Decree.* In proceedings taken in 1875 before the Collector to assess the rent of certain land which had been declared in 1863 liable to assessment, the plaintiffs, who had not been made parties to the proceedings in 1863, and who claimed to hold shares in the land, claimed to hold their shares as lakhiraj. Their claim was disallowed on the ground that they had no *locus standi*, and in March 1877 a final order was passed fixing a specific rent for the whole land. In June 1877, the plaintiffs instituted a suit to set aside that order, and to have a declaration that they held their shares as lakhiraj. It appeared that the plaintiff's allegation that they held shares in the land was correct. *Held*, that the proceedings in 1863 were not binding on the plaintiffs, or their interests in the land, and that inasmuch as the defendant was barred from instituting resumption suits against them, right to receive rent was also barred, and, therefore, the title of the plaintiffs to hold their shares rent free was complete. *Held*, also, that under section 42 of the Specific Relief Act (I of 1877) the plaintiffs were entitled, under the circumstances, to a declaration to the effect that they held their shares rent free. *OBHOY CHURN PAL vs. KALIPROSAD CHATTERJEA* ... 260

— VII of 1870, section 12. See CIVIL PROCEDURE CODE (ACT X OF 1877), SECTION 2 ... 567

— XXI of 1870, section 2. See HINDU WILLS ACT ... 138

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Sch. II, Art. 145. See LIMITATION ACT ... 71

## — I of 1872—

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- Section 2. See CIVIL PROCEDURE CODE, (ACT X OF 1877), SECTION 2 ... 567  
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**— in recital.** See HINDU LAW ... 12

**Adoption among Sudras.** See HINDU LAW ... ... 183

**Evidence of Conditional.** See HINDU LAW ... ... 76

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**Suit to set aside.** See LIMITATION ACT, IX OF 1871, SCH. II, ART. 129 ... ... 46

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**Adverse Possession.** See LIMITATION ACT (IX OF 1871), SCH. II, ART. 145 ... 71

**Affidavit, Time for filing.** See INSOLVENCY ... ... 382

**Agent, Termination of authority of—**  
*Notice—Acknowledgment—Limitation—Secondary Evidence.* H., who had acted as agent for the defendant in certain money transactions with the plaintiff, having left the defendant's service, subsequently signed a statement of account with the plaintiff in respect of such transactions. The plaintiff was aware that H. had quitted the defendant's service, though no formal notice was given of the fact. In a suit by the plaintiff upon the account, it was held, reversing the decision of the High Court, that he must be taken to have known that H. had no general authority to sign the statement of account on behalf of the defendant, and that the acknowledgment signed by him could not prevent the operation of the Statute of Limitations. When an important document is not produced, and no explanation is given of its non-production, an inference not unnaturally arises either that the letter, if written, does not contain that which it is represented to contain, or that no such letter ever existed. *DINOMOYI DEBI CHOWDHURANI v. LUCHMIPUT SINGH BAHADUR*... (P.C.) 101

**Agreement to execute Conveyance, Registration of, when treated as the Conveyance.** See REGISTRATION ACT, SECTION 17 (H) AND 23 ... ... 186

**Alienation by tenant for life, Suit to set aside—Purchase money, Repayment of.** By a petition filed in 1830, N, a Hindu, asked that certain property specified in a schedule to the petition which had, up to date, been in possession of himself and his ancestors, should be placed in the Collectorate books in the name of his daughter D, and that on her decease her daughters and other heirs should be heirs. In 1837, N acquired shares in a mousah called

**Alienation by tenant for life, &c.—*contd.***

K. He died in 1838, and the petition was subsequently held by the Privy Council to be a testamentary instrument. D sold the shares in mouzah K, and invested the proceeds in another mouzah. In a suit by a son of D's daughter against the purchasers to set aside the sale by D, the Subordinate Judge held that he was bound, in the first instance, to repay the whole of the purchase-money to the defendants. He further held that the after-acquired property passed by the petition. The High Court upheld the first finding of the Subordinate Judge, but expressed a doubt (it not being necessary to decide the point as there was no cross-appeal), whether the petition could pass after-acquired property. **RAI SHEWAK RAM v. BHOWANI BUKSH SINGH** ... 140

**Alienation by widow of houses built from income of husband's estate. See HINDU LAW** ... 66

**Alienations of ancestral property by Father. See MITAKSHARA JOINT FAMILY** ... 473

**Antecedent Debt. See MITAKSHARA JOINT FAMILY** ... 473

**Appeal. See REVIEW** ... 575

**— against portion of Decree. See LIMITATION ACT, XV OF 1877, SECTION 4** ... 267

**— by one of several defendants against decree. See LIMITATION** ... 573

**— Certificate under Act XXVII of 1860. Order refusing to recall, not appealable.]** There is no appeal from an order by a District Judge refusing to recall a certificate granted under Act XXVII of 1860. **NANUK PERSHAD v. NITKA LALL** ... 388

**— from order rejecting plaint for deficiency of stamp. See CIVIL PROCEDURE CODE (ACT X OF 1877), SECTION 2** ... 567

**— from order under section 18 of Act XL of 1858. See MINOR** ... 210

**— Limitation not taken in grounds of. See LIMITATION ACT (XV OF 1877), SECTION 4** ... 267

**— See CIVIL PROCEDURE CODE (ACT X OF 1877), SECTIONS 503 AND 505** ... 467

**— See CIVIL PROCEDURE CODE (ACT X OF 1877), SECTION 622** ... 234

**— Right to withdraw petition of. See CONVICTION FOR GRAVE OFFENCE ON APPEAL** ... 427

**— See LIMITATION ACT, IX OF 1871, SCH. II, ART. 145** ... 71

**— See SONTHAL REGULATION, III OF 1872, SECTION 5** ... 555

**Apportionment of debts due on mortgages of different shares of same property—*Priority—Decree, Form of.*** In certain lands A held an 8 annas share, and B and C each a 4 annas share. A having mortgaged his share to G, the respondent took a mortgage of the whole estate, and afterwards the appellant took a mortgage of B's share and half of A's share. Subsequently the respondent purchased the equity of redemption of the entire estate, the amount of the purchase-money being more than sufficient to pay off the first and second mortgages. *Held*, that the appellant was entitled to have an apportionment of the amounts covered by the different mortgages made, and to have an 8 annas share in the land put up for sale, unless the respondent was willing to pay off his mortgage debt. Rule of apportionment and form of decree set out. **GUNGA NARAIN SEN v. HURRIH CHUNDER CHANGDAIS** ... 336

**Arbitration—Act VIII of 1859, sections 315, 318 and 319—*Arbitrator, Appointment of sole, in place of four—Reference, Recall of—Consent.*** In a suit for a partnership account the matters in dispute were, by an order dated the 19th April 1877, referred by consent to four persons and an umpire, the award to be made within 5 months. Some steps were taken in the reference, but the arbitrators failed to make their award within the time limited, and meanwhile the umpire died. After negotiations for appointment of a fresh arbitrator and enlargement of the time had failed, the plaintiff moved that "the order of the 19th April 1877 might be recalled, and that the matters in dispute might be referred to the arbitration of such person or persons as the Court might be pleased to admit, or be tried and determined by the Court." The defendant opposed the application. An order was, however, made on the 29th May 1878, that the order of the 19th April 1877 should be recalled, and that all matters in difference between the parties should be referred to C. D., who should make his award in writing within three months, or within such further time as the said C. D. might think necessary. Certain provisions as to the payment of costs were also made. *Held*, that the order of the 19th May was not an order recalling the reference under section 318, and then referring it afresh under section 315 of Act VIII of 1859, but an order under section 319, appointing a new arbitrator in the place of the old ones, for which the consent of all parties was not necessary. Under section 319 of Act VIII of 1859, the Court has power to appoint an arbitrator or arbitrators either in the place of an arbitrator or in the place of arbitrators. **RAM PERSAD v. JUGGERNATH** ... 1

**Arbitrator. See ARBITRATION, APPOINTMENT OF SOLE, IN PLACE OF FOUR** ... 1

**— See ARBITRATION** ... 1

**Ascertained Goods, Contract for Sale of.**

See CONTRACT ACT (IX OF 1872), SECTIONS 55 AND 107 ... 582

**Assessment.** See RENT, SUIT FOR, UNDER A SETTLEMENT OF ... 208**Assignee of Decree, Title of.** See DECREE. ASSIGNMENT OF ... 498

**Assignment of Lease—Liability of ultimate Assignee to indemnify a Mesne Assignee against breach of Covenant—Indemnity, Contract of—Limitation Act (XV of 1877), Sch. II, Art. 83—Damages—Costs of Litigation.]** In 1864, under a lease containing a covenant to repair thoroughly every fourth year, A leased certain premises to B for a term of ten years. B died during the term, and his estate was administered by the Administrator-General, who, after repairing the premises, assigned the lease to L. & Co., of which firm the plaintiff was a member. The lease having subsequently become vested in the plaintiff alone, he, on the 3rd February 1872, assigned it to the defendants, the assignment being expressed to be under and subject to the conditions and covenants of the lease. The defendants failed to make the repairs in 1872 required in terms of the lease, and the lease expired without such repairs being effected. The original lessor having died, his representative O brought two suits against the defendants for damages for breach of the covenant to repair, and for arrears of rent, and obtained decrees for Rs. 6,000 for damages, and Rs. 1,917-3 for arrears and costs. Under these decrees certain property of the defendant was attached, but satisfaction not having been obtained, O sued the Administrator-General, and obtained a decree for Rs. 8,328-3 including costs. The Administrator-General having paid that sum to C on 15th April 1876, thereupon sued the plaintiffs for Rs. 10,110-15, which included the amount of the decree obtained against him with costs, and his own costs of defence. On the 8th April 1877, the defendants compromised the claims of O under the two decrees against them by the payment of Rs. 5,500. The suit of the Administrator-General was subsequently compromised also, the plaintiff who was then defendant agreeing to a decree for Rs. 6,932-12-11, and costs which amounted to Rs. 997-7-6. Thereupon the present suit was brought to recover from the defendants the sum recovered by the Administrator-General, together with his own costs of defence which amounted to Rs. 1,028-9. *Held*, on the authority of *Moule vs. Garrett*, L. R., 7 Exch., 101, that in the absence of an express covenant there was an implied obligation on the part of the defendants to indemnify the plaintiffs in respect of the covenants of the lease; and that the defendants were liable not only for the amount of the decree and costs obtained by the Administrator-General, but also for the costs incurred by the plaintiff in defending the suit brought by the

**Assignment of Lease—continued**

Administrator-General against him. *BAXENDALE vs. LONDON, CHATHAM, AND DOVER RY. CO.*, L. R. 10 Exch., 35; and *FISHER vs. THE VAL DE TRAVERS ASPHALTE CO.*, L. R., 1 C. P. D., 511, distinguished. [Compare Indian Contract Act, section 145, illustration (a)—ED.] *Held*, further, that as under Art. 83 of the Limitation Act, XV of 1877, limitation in the case of a contract of indemnity runs from the time when the plaintiff is actually damaged, limitation, in this case, must be taken to have run from the time when the Administrator recovered against him, and that the suit was not barred. *PEPIN v. CHUNDER SEKHUR MOOKERJEE* ... 167

**Arrears of Government Revenue, Sale of Land for.** See LIMITATION ... 539

— of Rent, Suit for. See ACQ VIII (B.C.) OF 1869, SECTION 29 ... 49

**Attachment—Execution of decrees, Sale under attachment during subsistence of a prior attachment—Priority of attaching creditors—Civil Procedure Code, Act X of 1877, section 813.]** In execution of a decree obtained on the 15th August 1876, the property of the judgment-debtor was attached on the 17th August 1877. The sale of the attached property was postponed pending a suit, instituted under the direction of the Court, by a claimant to the attached property. This suit having been dismissed on the 13th September 1878, the decree-holder, on the 25th September, applied for a sale of the property, and the 16th December was fixed for the sale. Meanwhile, on the 13th December 1877, a decree had been obtained by another party against the judgment-debtor, and in execution of this decree the same property was attached on the 13th September 1878, and under this attachment a sale took place on the 15th November following. On the 16th December, as fixed, the property was again sold under the first attachment. The auction purchasers, at that sale, on the 6th January 1879, applied, under section 313 of the Civil Procedure Code, to set aside the sale on the ground that the judgment-debtor had no saleable interest. *Held* (reversing the decision of the lower Court) on the authority of the following cases—*GOGARAM vs. KARTICK CHUNDER SINGH*, 9 W. R., 514; *LALLA JOOGUL LALL vs. BHUKA CHOWDHRY*, 9 W. R., 244; and *KARTICK CHUNDER SINGH vs. GOGARAM*, 2 W. R., Misc., 48, which the Court felt bound to follow, while it doubted their correctness, that the sale must be set aside. *CHUTKA PANDA v. GOSURDHONE DASS* ... 85

— of money in Court to credit of suit. See DECREE, ASSIGNMENT OF 498

— of Pension. See CIVIL PROCEDURE CODE (ACT X OF 1877), SECTION 166 ... 19

**Attestation of Wills.** See SUCCESSION ACT (ACT X OF 1865), SECTION 50 ... 303



**Attorney, Discharge of.** See SOLICITOR'S  
LIEN ... 406

**Bad Livelihood.** See CRIMINAL PROCEDURE  
CODE (ACT X OF 1872), SECTIONS 505 AND  
510 ... 128

**Birtah, Suit by.** See BIRT TENURES ... 146

**Birt Tenures—Act XVI of 1865—Act XIII  
of 1866—Birtah, Suit by—Limitation.]** A suit  
by a Birtah in respect of his tenure is cogniz-  
able under Act XVI of 1865, and Act XIII of  
1866, notwithstanding that he may not have  
been in possession in 1855. [Judgment of  
the Judicial Commissioner of Oudh affirmed.]  
DRIG BEJAI SINGH v. GOPAUL DUTT PAN-  
DAY ... (P.O.) 146

**Bona fides, in proceedings to enforce De-  
crees.** See LIMITATION ... 561

**Bond, Limitation in suit upon registered  
—Limitation Act, XV of 1877, Schedule II,  
Arts. 66 and 116—Compensation.]** Where a  
suit is brought to recover the principal and  
interest due upon a registered bond in which a  
day is specified for payment, the proper period  
of limitation is six years from the day so speci-  
fied as provided by Article 116, Schedule II of  
Act XV of 1877. [Per MITTER, J.—A suit for  
compensation for a breach of the conditions of  
a contract of the nature described in Article 66,  
Schedule II of the Limitation Act falls under  
Article 116 and 66 according as the contract is  
registered or unregistered. NOBO KUMAR MOO-  
KHOPADAYA v. SHROO MULLICK.]

**Building Tenures, Determination of  
transferable.** See TENURES TRANSFERABLE  
BY CUSTOM OR COUNTRY ... 117

**Cash Deposits.** See CRIMINAL PROCEDURE  
CODE (ACT X OF 1872), SECTIONS 505 AND  
510 ... 128

**Cause of Action arising out of Jurisdic-  
tion.** See JURISDICTION ... 417

**Cause of Action—Religious Services, Right to  
perform—Act VIII of 1859, section 32.]** A suit  
will lie to recover a specific pecuniary benefit to  
which the plaintiffs declare themselves entitled  
on condition of performing certain religious ser-  
vices, and if to determine the right to such pe-  
cuniary benefit it becomes necessary to determine  
incidentally the right to perform the religious  
services, the Court has jurisdiction to consider  
and decide the point. [Judgment of the High  
Court of Madras reversed.] TIRU KRISHNAMA  
CHURIAH v. KRISHNA SWAMI TATA CHU-  
RIAH ... (P.C.) 201

**Ceremonies necessary to Sudra Adoption.**  
See HINDU LAW ... 183

**—required by section 346 of  
Code of Criminal Procedure.** See CON-  
FESSION ... 353

**Certificate under Act XXVII of 1860, Or-  
der refusing to recall not appealable.**  
See APPEAL ... 388

**—withheld under what cir-  
cumstances.** See MINOR ... 210

**Charge, Alternate or Separate.** See CRIMINAL  
PROCEDURE CODE ... 349

**—See REGULATION VIII of 1819, sec-  
TIONS 13 AND 17...** ... 23

**Charitable or religious trusts under a  
will, Suit to enforce—Parties entitled to sue  
—Plaint, Necessary allegation in.]** The repre-  
sentatives of a testator are entitled to sue for the  
enforcement of the due performance of trusts  
created by him for religious and charitable pur-  
poses, and in which they are not personally inter-  
ested, but their suit will be dismissed, unless  
upon their plaint they substantially allege a state  
of circumstances, which, if proved, will constitute  
a distinct breach of trust. Where such a suit is  
brought, the plaintiffs ought to be required to  
give security for costs. BROJOMOHUN DASS v.  
HURBOLALL DASS ... 58

**Char Lands—Prescription.]** Independently of  
the title of Government to lands which have  
been originally formed as an island in the bed  
of a river, possession for three years under an  
order of a Magistrate in a proceeding under Act  
IV of 1840, does not create a title by prescrip-  
tion. [Judgment of High Court affirmed.] WISE  
v. AMBERUNNISA KHATOON ... (P.C.) 249

**Civil Procedure Code, Act X of 1877, Chap.  
XIX.** See CRIMINAL PROCEDURE CODE  
(ACT X OF 1872), SECTION 530 ... 206

**Section 2—Act XII of 1879, section 2—Court  
Fees Act, VII of 1870, section 12—Stamp, Re-  
jection of plaint for insufficiency of—Appeal  
—"Decree."] Notwithstanding the provisions  
of section 12 of the Court Fees Act (VII of  
1870) an order rejecting a plaint on the ground  
of its being insufficiently stamped, is appealable  
as a "decree" within the definition of "decree"  
in the Civil Procedure Code as amended by  
Act XII of 1879. AJODHYA PERSHAD SINGH  
v. GUNGA PERSHAD ... 567**

**Section 13, Explanation II—Estoppel—Decree  
in former suit, where question before the Court  
was not tried.]** In a suit for rent, alleged to be  
due under an agreement, the defendant pleaded  
a right of occupancy. The plaintiff, however,  
failed to prove the agreement, and the suit was  
dismissed without the question of the existence  
of the right of occupancy being considered.  
Subsequently, the plaintiff sued to eject the de-  
fendant, who pleaded that under explanation  
II, section 13, of the Code of Civil Procedure,  
the suit was barred by the decree in the former  
suit. Held, that inasmuch as the question as to

**Civil Procedure Code, Act X of 1877—contd.** the right of occupancy had not been tried in the former suit, the decree therein did not operate as estoppel. Explanation II, section 13, of the Civil Procedure Code, is meant to apply to cases, where the defendant having a defence which, if he had pleaded, he might have brought forward, did not put forward such defence, and a decree was given against him. **GHURSOBHIT AHIR v. CHOWDREY RAM DUTT SINGH** ... 537

**tion 13, Explanation V.** See *Res Judicata* ... 543

**tion 13, Explanation V—Res judicata—Judgment in former suit against one of several co-sharers.]** *Quare.*—Whether under section 13, Explanation V, of Act X of 1877, a judgment against a co-sharer in a suit in respect of part of the joint property, is binding upon another co-sharer in a suit against him, in which the same claim, as was made in the former suit, is preferred in respect of another portion of the joint property: and, whether Explanation V, section 13 of Act X of 1877, applies to a judgment under Act XIII of 1859. **HAZIR GAZI v. SONAMONE DOSSEE** ... 516

**tion 13.** See *Res Judicata* ... 305

**tion 32—Parties added—Limitation—Contribution—Wrong-doers.]** Where the original plaintiffs, before the issue of the summons in the suit, assign their interest in such suit, and the assignees are made parties plaintiffs, limitation runs from the date of the plaint, and not from the time when the assignees were made parties. In a suit for damages where a joint decree has been obtained, there is a right of contribution among the defendants *inter se*, only if the wrong complained of were committed under a *bona fide* claim of right. In such a case the Court, where a suit is brought for contribution, is bound to enquire what share each defendant in the former suit took in the transaction upon which it was based, in order to determine in what proportions contribution should be allowed. **SREEPUTTY ROY v. LOHARAM ROY, 7 W. R. (F.B.), 384, cited. SUPUT SINGH v. IMRIT TEWARI** ... 62

**tion 17.** See JURISDICTION ... 417

**tion 111.** See SET-OFF ... 294

**tions 141, 389 and 390.** See COMMISSION, EVIDENCE TAKEN ON ... 109

**tion 206.** See Review ... 575

**Civil Procedure Code, Act X of 1877, sections 242 and 244 (c).** See LIMITATION ... 489

**tion 206—Pension—"Saleable property"—Attachment.]** In case of pensions not exempted from attachment under section 206 of the Civil Procedure Code (Act X of 1877), it is only arrears in respect thereof actually accrued due that are attachable in execution of a decree. **SYUD TUFFOOZUL HOSSAIN KHAN v. RUGONATH PEEHAD, 14 Moore's I. A., 40 (S. C.) 7 B.L.R., 186, cited and followed. BHOYRUB CHUNDER ROY v. MADHUB CHUNDER SEN** ... 19

**tions 344, 351, 354, 588 (17)—Insolvent, Application to be declared—Insolvent, Order refusing application to be declared.]** An order under section 351 of the Civil Procedure Code, disallowing an application to be declared an insolvent, is not appealable. *Per Curiam.*—The appeal allowed under section 588, clause 17 of the Procedure Code (as amended by Act XII of 1879,) so far as an order under section 351 is concerned, appears to be on behalf of a judgment-creditor only. **JUGMEERUN GUPTA v. HURRO KUMAR PAL** ... 135

**tion 401.** See PAUPER, DEFENCE BY, *in forma pauperis* ... 120

**tions 503 and 505—Receiver, Appointment of—Appeal.]** An order made by a Subordinate Judge, dismissing an application under section 503, for the appointment of a receiver in a suit pending before him, or declining to nominate a receiver, is an order under that section, and not under section 505, and is therefore appealable under section 588 of the Civil Procedure Code, as amended by Act XII of 1879. A Subordinate Judge, if he has good grounds, may decline to appoint a receiver even after he has received the necessary authority from the District Judge under section 505 to do so. **GOSAIN DULMIR PURI v. TEKAIT HETNARAIN** 467

**tion 622—Appeal—Jurisdiction—Costs, Execution of Decree for, where Decree-holder is not made party to an appeal under which the whole decree is set aside.]** The lower Appellate Court having allowed an appeal with costs, the respondents in that Court preferred a second appeal to the High Court, but did not make A, who was one of the successful parties in the lower Appellate Court, a party. The High Court reversed the decision of the lower Appellate Court. *Held*, that A was not bound by the decree of the High Court, and was entitled to execute the decree for costs obtained by her in the lower Court. Where an appeal, preferred to the District Court against an order refusing an ap-

**Civil Procedure Code, Act X of 1877—contd.**  
 plication for execution of a decree for costs, was allowed, the High Court, on a second appeal being instituted, held that no appeal lay either to the District Court or to the High Court, but entertained the matter under section 622 of the Civil Procedure Code, and upheld the order of the District Court. **BHOYRUB CHUNDER DOSS v. WAJEDUNNISSA KHATOON** ... 234

**tions 623 and 624.** See **SMALL CAUSE COURT ACT, XI OF 1865, SECTION 21** ... 549

**Client, Death of.** See **SOLICITOR'S LIEN** 406

**Collector, Jumma fixed by, to be final.** See **REGULATION VII OF 1832, SECTION 14** ... 365

**—Sale by.** See **LIMITATION** ... 539

**Commission, Evidence taken on—Documents attached to return of Commission—Civil Procedure Code (Act X of 1877), sections 141, 389 and 390—Practice.]** Documents attached to the return of a commission, and identified with the documents referred to in the evidence, may be read at the hearing of the suit in which the commission issued, unless they have been objected to on being tendered in evidence before the Commissioner. Objections to the admissibility of such documents cannot be taken at the hearing of the suit. **STRETHERS v. WHEELER** ... 109

**Compensation.** See **BOND, LIMITATION IN SUIT UPON REGISTERED** ... 579

**Competent Jurisdiction.** See **Res Judicata** ... 305

**Compromise of suit by widow.** See **HINDU LAW** ... 76

**Compounding offences.** See **INDIAN PENAL CODE (ACT XLV OF 1860)** ... 392

**Confirmatory Grant.** See **POTTAH OF PROPERTY MORTGAGED TO GRANTOR** ... 21

**Confession—Criminal Procedure Code, Act X of 1872, sections 122 and 346.]** A confession made by an accused person before a Magistrate who has jurisdiction to deal with the matter to which it relates, may be made the commencement of a trial or enquiry under Chapter XV of the Criminal Procedure Code, and be treated as a confession under section 346, whether or not the case be still under the investigation of the police. *Per Curiam*:—The object of section 122 of the Code of Criminal Procedure is to enable any Magistrate, other than the Magistrate by whom the case is to be tried or enquired into, to record a confession promptly. **BEHARI HADJI, 5 C. L. R., 238, and REG v. SHIVYA, I. L. R., 1 Bom., 219, discussed. KHEENO MOHAR v. EMPRESS** ... 269

**Confession—continued.**

**2. ———Criminal Procedure Code (Act X of 1872), sections 122 and 346.]** Two accused persons, on being arrested, were forwarded in custody to a Magistrate who had jurisdiction in the matter with which they were charged, and who afterwards conducted the preliminary enquiry, and committed them to the Court of Sessions. Before the Magistrate each made a confession, but neither of them attested his confession by his signature or mark. *Held*, that the confessions, although the Magistrate had noted that they were taken under section 122 of the Code of Criminal Procedure, must be regarded as having been taken in the course of a preliminary enquiry, and that the provisions of section 346, allowing the evidence of the Committing Magistrate to be taken, applied. *Per Curiam*.—Section 122 contemplates and provides for cases in which confessions are recorded by a Magistrate other than the Magistrate by whom the case is to be enquired into or tried. **EMPRESS v. ANAUTRAM SINGH** ... (F.B.) 297

**3. ———Criminal Procedure Code (Act X of 1872), sections 122 and 346—Certificates required by section 346 of Criminal Procedure Code—Evidence as to confession under section 346 of Criminal Procedure Code.]** A certificate which contained the words "taken by me," but in which the Magistrate omitted to record that the prisoners' statement was taken in his hearing, was treated to be substantially a compliance with section 346. *Per Curiam*.—Evidence taken under the last clause of section 346 ought to be by the Committing Magistrate. Where a confession is taken under section 122 of the Code of Criminal Procedure, the omission to record the certificate, required by section 346, cannot be remedied by taking evidence under the last clause of the latter section. **NISAI MESTRI v. EMPRESS** ... 353

**Consanguinity, Connection by.** See **MITAKSHARA** ... 500

**Consent to arbitration.** See **ARBITRATION** ... 1

**Consent to irregularity in trial.** See **CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTIONS 250 AND 265** ... 521

**Contract Act (IX of 1872), section 44—Release of one of several judgment-debtors jointly liable for amount decreed.]** Having regard to section 44 of the Contract Act, a release of one of two judgment-debtors who are made jointly liable for the amount of the decree, does not discharge the other from liability. **KIAM ALI v. KAYAMADDI** ... 213

**—, section 60.** See **LIMITATION** ... 489

**—, section 135.** See **PRINCIPAL AND SURETY** ... 591

**Contract Act (IX of 1872), sections 55 and 107—Ascertained goods, Contract for Sale of—Time, Essence of contract.]** A contract for the sale of ascertained goods having been made on the terms: cash on delivery to be given and taken in ten or eleven days, the vendee obtained an extension of time for the performance of his part of the contract, agreeing in the meantime to pay godown rent and interest. Within the time so extended, he took delivery of, and paid for portion of the goods, and subsequently obtained a further extension of time. He was unable to take delivery during this further extended time, but shortly after it expired, he tendered the price of the remaining portion of the goods, and demanded delivery from the vendors, who stated that they had rescinded the contract. Thereupon the vendee brought an action for damage for non-delivery. *Held*, that time was of the essence of the contract, and that under section 55 of the Contract Act (IX of 1872) the vendors were entitled to rescind. **BULDEO Doss v. HOWE** ... .. 582

**Contribution.** See **CIVIL PROCEDURE CODE (ACT X OF 1877), SECTION 32** ... .. 62

**Convictions, Evidence of previous.** See **MIS-DIRECTION** ... .. 219

**Conviction for graver offence on appeal—Criminal Procedure Code (Act X of 1872), section 88—Appeal, Right to withdraw petition of.]** It is not competent to an Appellate Court to find a prisoner on appeal guilty of a graver offence than that with which he was charged at his trial, unless an opportunity is afforded to the accused of defending himself against the charge so altered. **IN THE MATTER OF CHUNDER NATH DEB**, 5 I. L. R., 373, distinguished. *Quere.*—Whether petition of appeal against a conviction can be withdrawn after the Appellate Court has perused the evidence. **DWARKA MANJHRE, IN THE MATTER OF** ... .. 427

— **Statement of reasons for.** See **CRIMINAL PROCEDURE CODE (ACT X OF 1872), SECTIONS 227 AND 464** ... .. 273

**Co-sharers, Effect of sale by one of several.** See **RENT, APPORTIONMENT OF, BY PURCHASER FROM ONE OF SEVERAL JOINT OWNERS** ... .. 421

— **Judgment in former suit against one of several.** See **CIVIL PROCEDURE CODE, ACT X OF 1877, SECTION 13, EXPLANATION V** ... .. 516

— **Rent suit by one of several co-sharers.]** One of several co-sharers in a talook sued the tenant for a certain share of the rents for the years 1281, 1282, and 1283. It appeared that he had been in the habit of collecting his share separately, but that in former years he had claimed and collected a smaller share than he now claimed to be entitled to. The co-sharers were made defendants, but did not appear. The

**Co-sharers—continued.**

tenant defendant objected that he was not liable to pay any fractional share. *Held*, that as the co-sharers, who were the only persons interested in disputing the amount claimed by the plaintiff, had not entered an appearance, it was not necessary to raise an issue or to give evidence as to the amount of that share, and that the plaintiff was entitled to a decree for the amount claimed. **GUNGA NARAIN SIRCAR v. SRINATH BANERJEE** 16

— **Suit for rent by one of several—Rent, Suit by one of several Co-sharers—Fractional share of Landlord, Determination of.]**

Where, on the consent of all the co-sharers of an undivided property, the tenant has agreed to pay the rent to the different shareholders in proportion to their respective shares, he cannot, at his option, cease to pay the fractional rent which he has previously paid, or agreed to pay, to one or more of his landlords. **SHAIKH GUNT MAHOMED v. T. D. MORAN**, 2 O. L. R., (F.B.), 370, explained. Where there is an arrangement, by which a tenant has agreed to pay the rent to his landlords in proportion to their respective shares in the lands held by him, if a suit be brought by one of such landlords, claiming rent in respect of his particular share of such lands, and in that suit an issue as to right of the plaintiff to the share claimed is fairly raised and determined, the co-sharers acquiescing in that determination, the tenant cannot be allowed to avoid his liability to pay the rent claimed to the plaintiff, on the ground that he had never before recognised the share as being that alleged. **GUNGA NARAIN SIRCAR v. SRINATH BANERJEE**, 6 O. L. R., 26, followed. **LUTFUL HUQ v. GOPI CHUNDER MOZUMDAR** ... .. 402

**Costs, Execution of Decree for, where decree-holder is not made party to an appeal under which the whole decree is set aside.** See **CIVIL PROCEDURE CODE (ACT X OF 1877), SECTION 623** ... .. 234

— **of litigation when allowed as Damages.** See **ASSIGNMENT OF LEASE** ... 167

**Court Fees Act, VII of 1870, section 12.** See **CIVIL PROCEDURE CODE, ACT X OF 1877, SECTION 2** ... .. 567

**Court Fee Stamps, Payment of, in order to turn petition to sue in forma pauperis into a plaint.** See **PRACTION** 233

**Courts, Closing of.** See **PRACTION** ... 239

**Criminal Procedure Code, Act X of 1872, section 46.]** It is not competent for a Magistrate, to whom a case has been referred under section 46 of the Code of Criminal Procedure, to return the case to the referring Magistrate on the ground that in his opinion the latter has power to pass an adequate sentence. All orders passed after a case has been so returned are illegal. **DULA FAQUEER v. BHAGIRAT SIRCAR** 276

**Criminal Procedure Code, Act X of 1872, section 84—Procedure—Transfer of Case.** Where it appeared that the only officers in the district of P., otherwise competent to hear an appeal from a conviction for theft of property alleged to have belonged to the Road Cess Committee of the district, were, by reason of their connection with that Committee, interested in the result of the appeal, the High Court directed that the petition of appeal, together with all papers connected therewith, should be forwarded to the Sessions Judge of the 24 Pergunnahs to be dealt with as an appeal presented in his own Court. **DWARAKA NATH BANERJEA, IN THE MATTER OF** 279

**sections 72 and 84—European British subject—Jurisdiction, Waiver of.** Section 72 must be strictly construed in connection with section 84 of the Code of Criminal Procedure, and before a European British subject can be considered to have waived the privilege conferred upon him by the former section, it must appear that his rights under that section have been distinctly made known to him, and that he has been enabled to exercise his choice and judgment whether he would or would not claim such rights. **IN RE FOX, 1 Tay. and Bell Rep., 226; and REG. v. BHOLANATH SEN, 1 L. R., 2 Cal., 23. P. QUIRAS AND F. C. MAUNDERS, IN THE MATTER OF...** 463

**section 119.** Where the accused was charged under section 193 of the Penal Code with having given false evidence, in that he denied having made certain statements which he was alleged to have made to the Inspector of Police, that officer was examined and merely put in two documents containing the statements alleged as the records of what had taken place. *Held*, that these documents being inadmissible in evidence under section 119 of the Code of Criminal Procedure, evidence ought to have been given as to what was actually stated by the accused to the Inspector of Police. **IN THE MATTER OF SHEIKH DABU** 47

**sections 122 and 346. See CONFESSION** ... 289

**sections 122 and 346. See CONFESSION** ... 297

**sections 122 and 346. See CONFESSION** ... 353

**sections 186 and 249. See CROSS-EXAMINATION, REFUSAL OF MAGISTRATE TO ALLOW** ... 53

**sections 227 and 464—Conviction, Statement of reasons for.** Although generally it is not necessary, in cases in which no appeal lies, for a Magistrate to record the reasons for passing his judgment, yet under clause (h) of section 227 of the Code of Criminal Procedure, in case of conviction he ought to enter in the register, to be kept under that section, a brief statement of the reasons for

**Criminal Procedure Code—continued.**

such conviction; but an omission to do so may, under some circumstances, be remedied at a subsequent time. **DOWLAT SING, IN THE MATTER OF** ... 273

**section 250. See CROSS-EXAMINATION BY COURT** 431

**sections 250, 265—Riot, Trial of members of opposing factions for—Procedure in trials of members of opposing factions in riots—Consent of pleaders to irregularity in trial—Irregularity—Examination of accused by Court.** The members of two opposing factions in a riot were committed for trial to the Sessions Court, on two distinct and separate committals. The Judge, who sat with a Jury, having taken the evidence of the witnesses for the prosecution in one case, upon his own suggestion, but with the consent of the pleaders for the accused, postponed the taking of the evidence for the defence in that case, and immediately proceeded before the same Jury to take the evidence for the prosecution in the counter case. This having been done, the Court examined the witnesses for the defence in the first case, and then in the second case. The pleaders for the defence in both cases having addressed the Court, and the Government Pleader having been heard in reply, the Judge summed up the facts in both cases to the Jury who returned a verdict of guilty in respect of all the accused. *Held*, that the procedure resorted to by the Judge was a violation of the salutary rule, that in such cases, the trials should be kept entirely distinct; and that the accused having been materially prejudiced by the mode of trial adopted, the trials should be set aside. *Held* also, that the consent given by the pleaders for the defence could in no way cure the defect in the arrangement suggested by the Judge. The power allowed by section 250 of the Code of Criminal Procedure, authorising the examination by the Court of an accused, does not contemplate his being subjected to cross-examination, and the Judge cannot be allowed, by the method of examination adopted by him, to endeavour to force an accused person to criminate himself. The object of the power entrusted to the Court by the section quoted, is to enable the Court, from time to time, to give the accused (especially if undefended,) an opportunity to explain, if he desire to do so, any facts which have been spoken to by the witnesses for the prosecution; or, at the close of the case, to obtain from the accused what explanation he may desire to offer regarding facts which, in the opinion of the Court, implicate the accused with the offence of which he stands charged. **REG. v. SHEIK BANU, 8 W. R. (F.B.), 47, distinguished; REG. v. BHOLANATH SEN, 25 W. R., 57-7; and IN RE CHINIRASH GHOSH, 1 C. L. R., 436, followed. HOSSEIN BUKHAR AND SHAKIR SHEIKH** ... 431

**Criminal Procedure Code Act X of 1872, sections 295, 296—Reference to High Court.]** One of two prisoners, who were tried jointly before a Bench of Magistrates on the complaint of the District Magistrate, appealed to the Sessions Judge and was acquitted. The District Magistrate thereupon, under sections 296 and 297 of the Criminal Procedure Code, transmitted the proceedings in the case to the High Court, and asked that they might be quashed on the ground that there had been a failure of justice. *Held*, that the Magistrate was not competent to refer the proceedings of a superior Court to the High Court. **DAVID, IN THE MATTER OF** ... 245

**section 443. See CONVICTION OF GRAVE OFFENCE IN APPEAL** ... 427

**section 457—Penal Code, (Act XLV of 1860), sections 149 and 325—Charge, Alternate or separate—Jury, Verdict of—Sentence on appeal from acquittal, Commencement of—Acquittal, Reversal of sentence of.]** Under section 457 of the Code of Criminal Procedure (Act X of 1872), it is competent to a Jury to return a verdict of guilty of an offence under section 325 only of the Penal Code, although that offence did not form the subject of a separate charge, but was entered as a charge coupled with an offence under section 149 of the Penal Code. Where the Jury is unanimous, their verdict must be received unless it be contrary to law; the Court is not competent in such a case to direct it to reconsider its verdict. Where on the appeal of Government an order of acquittal is set aside and sentence passed, that sentence will commence to run from the date of the committal of the accused to jail, and not from the date of their arrest or of the sentence on the appeal. **EMPRESS v. MAHUDDI** ... 349

**sections 505, 510—Bad livelihood—Security for good behaviour—Sureties—Cash Deposits.]** Seven persons were charged, under section 505 of the Code of Criminal Procedure, with being persons of notoriously bad livelihood. Two only were proved to have been ever convicted of any substantive offence, and the convictions proved against them took place 30 and 32 years before, but it appeared that they had, in 1867, been imprisoned for three years as budmashes in default of finding security. The Magistrate, under section 510 of the Criminal Procedure Code, ordered each of the seven accused to find two sureties to the amount of Rs. 500, three of them to deposit a cash Rs. 1,000 each, two of them Rs. 500, and the remaining two Rs. 250, and in default to have rigorous imprisonment for one year. The High Court *held* that it was illegal to require the accused to deposit cash instead of giving bonds as security for good behaviour, and that the order of the Magistrate as to sureties was prohibitive. It accordingly quashed the orders requiring the deposits of cash, and the findings

**Criminal Procedure Code—continued.** of sureties, and directed that six of them (it being found that as to the seventh the Magistrate acted entirely without jurisdiction) should enter into bonds for the good behaviour in the amounts which they were directed to deposit in cash. The sections of the Procedure Code relating to budmashes should be exercised with extreme discretion. **EMPRESS v. KALA CHAND DASS** ... 128

**sections 521, 523, and 532—Obstruction to thoroughfare or public place—Jury, Duty of, under section 523 of the Criminal Procedure Code—Juror, Removal of.]** In order to give a Magistrate jurisdiction to direct the removal of an unlawful obstruction under section 521 of the Code of Criminal Procedure, the place obstructed must be a thoroughfare or public place; and where this is disputed by the person, on whom notice to remove the obstruction has been served, the decision of the question cannot be referred, under section 523, to a Jury. A Magistrate ought not, at the instance of one party, and behind the back of the other, to cancel the appointment of a juror, even if such juror be his own nominee. **CHUNDER NATH SEN v. RAM DYAL GHUTTUCK** ... 379

**section 530—Decree, Resistance to execution of—Possession—Civil Procedure Code, Act X of 1877, Chapter XIX.]** A Criminal Court ought not to interfere in cases where a purchaser under a decree, is resisted in getting actual possession of the property which he has bought, the procedure to be adopted in such cases being that provided in Chapter XIX of the Civil Procedure Code. **PRAYAG SINGH v. FUZOOL HOSSEIN** ... 206

**section 530—Parties.]** Where there is a dispute likely to lead to a breach of the peace concerning land, and proceedings are recorded and had under section 530 of the Criminal Procedure Code, no order should be made against one who is acting as the servant of another person who claims to have possession of the land, unless that other person is made a party to the proceedings. **JITRAHAN v. BANSEUP DHOBI** ... 193

**Cross-examination—Depositions before the Magistrate—Discrepancies.]** In a trial before a Sessions Court the attention of the Jury may be called to discrepancies between the evidence given by witnesses in such Court and that given before the Committing Magistrate without the depositions before the Magistrate being put in. **EMPRESS v. HURBAN CHUNDER MITTER** ... 390

**by Court—Criminal Procedure Code (Act X of 1872) section 250.]** It is improper for the Court to cross-examine a prisoner with the apparent object of convicting

**Cross-examination—continued.**

him out of his own mouth of false statements, and so making him prejudice himself in respect of the matter with which he is charged.  
**EMPRESS v. BEHARI LALL BOSE** ... 481

**Refusal of right of—**

**Criminal Procedure Code (Act X of 1872), sections 186 and 249.]** A, B, and C having been charged with murder before a Magistrate, two Vakeels presented their vakalutnamahs, and applied to be allowed to conduct the defence of the accused. The Magistrate refused permission, and after recording the depositions of the witnesses committed the accused to take their trial before the Sessions Court. In the Court of the Magistrate the only material evidence for the prosecution was that of three witnesses, who, on being examined in the Sessions Court, denied all knowledge of the facts to which they had deposed before the Magistrate. Two of them denied having made the statements recorded, while the third admitted the statements attributed to him, but asserted they were false and made under pressure. The Sessions Judge, disbelieving the statements made in his Court, thereupon, under section 249 of the Code of Criminal Procedure (as amended by section 20 of the Amending Act), used the previous depositions as evidence in the case, and mainly upon these convicted the accused of murder and sentenced them to transportation for life. Against this conviction and sentence the prisoners appealed to the High Court, on the ground that the previous depositions ought not to have been used as evidence in the case, as the Magistrate had refused to allow their pleaders to appear and cross-examine the witnesses who made the depositions. The High Court affirmed the conviction and sentence.  
**DHAM MUNDUL, IN THE MATTER OF** ... 53

**Custom of Inheritance.** See **EVIDENCE ACT I OF 1872, SECTIONS 35, 48 & 49** ... 593

**Damages.** See **ACT XI OF 1865, SECTION 6** 487

See **ASSIGNMENT OF LEASE** ... 167

**for breach of covenant, Suit for—Decree for nominal damages—Equity—Limitation Act, XV of 1877, Sch. II, Arts. 32 and 120.]** Plaintiffs sued the defendant to compel him to fill up a tank excavated by him four years previously in contravention of the terms of his lease on their land, and to restore the land to its original condition, or in the alternative to pay damages for breach of the covenants of his lease. It was found that the value of the land had been considerably enhanced by the excavation of the tank in question, and by the planting of a garden round it. It was also found that the plaintiffs, or their predecessors, had stood by, and allowed the defendants to improve their property without making any attempt to restrain him. *Held*, that under

**Damages for breach of covenant, See—** *old* the circumstances it was inequitable to require the defendant to restore the land to its original state, or to make him pay substantial damages. But that inasmuch as the plaintiffs had a right to vindicate their authority as landlords by bringing the suit, they were entitled to nominal damages and the costs of the suit. *Held* also, that such a suit was governed, not by Art. 32, but by Art. 120, Sch. II of the Limitation Act XV of 1877. **EDAKNATH NAG v. KHETTER PAL SHIBIRUTTO** ... 569

**Dattaka Chandrika, section II, paragraphs 7 and 8.** See **HINDU LAW** ... 393

**Dattaka Mimansa, section V, paragraph 20.** See **HINDU LAW** ... 393

**Death of Client.** See **SOLICITOR'S LIEN** 406

**Debt.** See **LIMITATION** ... 489

**Declaratory Decree.** See **ACT VIII (B.C.) OF 1869, RESUMPTION PROCEEDINGS UNDER** 260

**Reversionary heirs, Suit by, to restrain widow from Committing Waste—Waste.]** Plaintiffs who were the presumptive heirs in reversion of P., sued to set aside certain alienations made by his widow on the ground that such alienations had been made without any legal or justifying necessity, and to prevent the widow from committing waste of the properties in her possession of a widow of her late husband. *Held*, that the suit would lie. **SHILOGANGA case, L. R., 2 I. A., 169 cited; THAKOORANI SHIBA vs. MOHUN LALL, 7 W. R., (P.C.) 25, followed. CHATU MISSEER vs. JEEVA MISSEER** 568

**Decree.** See **CIVIL PROCEDURE CODE, ACT X OF 1877, SECTION 2** ... 567

**Assignment of—Assignee of decree, Title of—Attachment of money in Court to credit of suit.]** A, having in a suit obtained an *ex-parte* decree, assigned his interest in such decree to B and C, who neglected to have their names substituted for that of A on the record. The defendant in the suit subsequently obtained an order setting aside the *ex-parte* decree, and allowing him to defend on condition of his depositing in Court the amount of the claim and the costs already incurred. The money was paid and the suit re-heard, and again decided in A's favour. Meanwhile D, who had previously obtained a decree for costs against A, had attached the sum deposited in Court in satisfaction of his decree. On a claim by B and C, being put forward under their assignment to the same sum of money, *Held*, that although they might have an equitable title, such title could not prevail against that of the attaching creditor. **GRISH CHUNDER SEIN v. OBBEI CHURN MULLICK** ... 485

**Form of.** See **APPORTIONMENT OF DEBT DUE ON MORTGAGES OF DIFFERENT SHARES OF SAME PROPERTY** ... 322

**Decree for costs, Execution of, against defendants who have not appealed.**

See LIMITATION ... .. 573

— in former suit where question at issue in present suit was not tried. See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTION 13, EXPL. II ... 537

— Proceeding to enforce. See LIMITATION... .. 561

— Question to be determined by Court executing. See LIMITATION 489

— Resistance to execution of. See CRIMINAL PROCEDURE CODE, ACT X OF 1873, SECTION 530 ... .. 206

— for nominal damages. See DAMAGES FOR BREACH OF COVENANT, SUIT FOR ... .. 569

**Denial of Landlord's title by occupancy ryot.** See EJECTMENT ... .. 375

**"Deposit"** See LIMITATION ACT, XV OF 1877 ... .. 470

**Deposition before the Magistrate.** See CROSS-EXAMINATION ... .. 390

**Discharge of Attorney.** See SOLICITOR'S LIEN ... .. 406

**Discrepancies between evidence in Sessions Court and depositions before Magistrate.** See CROSS-EXAMINATION 390

**Dissolution of Firm of Solicitors.** See SOLICITOR'S LIEN ... .. 406

**District Court.** See PROBATE ... .. 391

**Divisibility of Impartible Raj, which has been resumed and regranted.** See HINDU LAW ... .. 153

**Documents attached to return of Commission.** See COMMISSION, EVIDENCE TAKEN ON ... .. 109

**Document thirty years old.** See EVIDENCE ACT (I OF 1872), SECTION 65, CLAUSE (c) AND SECTION 90 ... .. 199

**Easements, Claims to.** See *Res Judicata* 543

— Definition of, under Limitation Act. See JULKAR RIGHT ... 269

**Ejectment—Denial by occupancy tenant of his landlord's title—Estoppel.]** In a suit brought by a landlord against his tenant, who had denied his title and refused to pay rent, the latter by his defence again wholly denied the plaintiff's title. The plaintiff alleged that the defendant had been his tenant for a period of 28 years up to 1279. The Court of first instance passed a decree in favour of the plaintiff. On appeal before the Subordinate Judge, the defendant set up an alternative defence claiming to have acquired an occupancy title. *Held*, by the High Court, that,

**Ejectment—continued.**

by his conduct in denying his landlord's title, the defendant had forfeited the right claimed, and that the plaintiff, who had proved his title and possession within 12 years previous to suit, was entitled to a decree. *KRISHNA CHUNDER CHATTERJEA v. SATTYA BHAMA* ... .. 375

— See REGULATION VII OF 1822, SECTION 14 ... .. 365

**Enhancement of Jumma of lands situate in a Town.** See REGULATION VII OF 1822, SECTION 14 ... .. 365

— of Rent—Accretion—Notice—

*Act VIII (B.C.) of 1869, section 14—Regulation XI of 1825, section 4, clause 1.]* Where land has been added to the jote of a tenant by gradual accretion, the landlord is entitled to an increased rent on account of such accretion on the conditions laid down in Regulation XI of 1825, section 4, clause 1; but before such increased rent can be imposed, it is necessary that a notice should have been duly served in accordance with the provisions of section 14 of Act VIII (B.C.) of 1869. See *BOKRONATH MUNDUL v. BINODH RAM SKIN*, 10 W. R., F. B., 33. *SHORUSSOTI DASI v. PARBUTTI DASI* ... .. 362

**Equity.** See HINDU LAW... .. 34

— See DAMAGES FOR BREACH OF COVENANT, SUIT FOR... .. 569

**Equitable Relief.** See ACT VIII (B.C.) OF 1869, SECTION 27 ... .. 494

**Estoppel.** See CIVIL PROCEDURE CODE, ACT X OF 1877, SECTION 13, EXPL. II ... 537

— See EJECTMENT ... .. 375

— See *Res Judicata* ... .. 305

**European British Subject.** See CRIMINAL PROCEDURE CODE, SECTIONS 72 AND 84. 463

**Evidence Act (I of 1872), sections 3, 11, 13, 40, 41, 42, 43—Judgments and decrees in former suits—"Transaction"—"Fact."]** Where the question at issue was whether the plaintiff was entitled to succeed as heir to B, and the issue was dependent upon whether or not S. survived M, the plaintiff relied upon a judgment in a former suit between the defendant and a third party, in which the question whether S. survived M, was decided in the affirmative. *Held*, by the Full Bench (MITTER, J., *dissentiente*), that the judgment in the former suit was neither a fact within the meaning of section 11, nor a transaction within the meaning of section 13 of the Evidence Act, and that it was inadmissible in evidence in the present suit. *GUJJI LALL v. FUTEH LALL* ... .. (F.B.) 439

— section 32—*Statements by deceased as to cause of death.* Where the accused was charged with culpable homicide not amounting to murder, the question was, whether the deceased had died from the effects of a



**Evidence (Act I of 1872)—continued.**

beating. *Held*, that a statement by the deceased that he had been beaten by the accused was admissible in evidence under section 32 of the Evidence Act, without proof that at the time of making the statement the deceased was conscious of any fatal effect of such beating. *EMPERE v. BLECHYNDEN* ... 278

— **section 35—Measurement** *Papers prepared by Butwara Ameen.* The measurement papers, prepared by a Butwara Ameen, deposited by the Collector to make a partition, do not come within section 35 of the Evidence Act. *MOHI CHOWDREY v. DIBRO MISSRAIN* ... 189

— **section 35, 43, and 49—Custom of inheritance—Regulation VII of 1822, Records made under. Under Regulation VII of 1822, which directed that certain officers of Government should ascertain and record "the fullest information in regard to landed tenures, the rights, interest, and privilege of the various classes of the agricultural community" and that "their proceedings should embrace the formation of as accurate a record as possible of all local usages connected with landed tenures," extracts from *Wajitulars* or village administration papers, and statements of the proprietors of villages showing that, in a particular clan, daughters were excluded by the custom of the clan from succeeding to the inheritance of their father's estate, were recorded and duly authenticated by the proper officers. *Held*, that the records containing such extracts and statements were admissible in evidence under section 35 of the Evidence Act. *Quere.*—Whether such records were not also admissible in evidence under section 43 or section 49 of the same Act. *DABER DUT vs. SHEIKH EMIT ALI*, 2 N. W. P. H. O. R., 395, cited. *LEKRAJ KUAR v. MAHPAL SINGH* ... (P. C.) 593**

— **section 54. See MIS-**  
**DIRECTION** ... 219

— **section 65, clause (c)**  
**and section 90—Will thirty years old—Docu-**  
**ment 30 years old, and lost. If a document be shown to have been lost in proper custody, and to be more than thirty years old, secondary evidence of its contents may be given under section 65, clause (c) and section 90 of the Evidence Act, without proof of execution. *KHETTER CHUNDER MOOKERJEE v. KHETTER PAUL SRENIHERUTNO* ... 199**

— **section 83—Map,**  
*Presumption of accuracy of—Map made by Government, Effect of cancelling of.* The fact that a survey map, made by the authority of the Government, has been annulled and superseded by an order of the Board of Revenue, and that a fresh survey has been taken, and a map made in accordance therewith, does not affect the presumption allowed under section 83 of the Evidence Act, as to the accuracy of the former sur-

**Evidence Act (I of 1872)—continued.**

vey map. *JUGANSHU SINGH ROY v. BYOOTIS NATH DUTT* ... 519

**Evidence as to confession under section 346 of Criminal Procedure Code.**  
*See CONFESSION* ... 353

— **in case of re-formation of**  
**Char Lands. See LIMITATION ACT, IX**  
**OF 1871, SEC. II, ART. 46** ... 93

— **of conditional adoption. See**  
**HINDU LAW** ... 76

**Execution of decree against one judg-**  
**ment-debtor pending appeal by another**  
*—Irregularity in execution sale—Proclamation.*

A decree having been obtained against A and B upon a mortgage, the latter appealed to the High Court, and subsequently, on the mortgaged properties being attached and advertised for sale, while the appeal was pending, applied for and obtained an order for stay of the sale as far as she was concerned. The sale, however, took place on the day originally fixed, but no fresh proclamation was issued, although it was announced, previous to the sale, that only A's rights and interests would be sold. *Held*, that the sale was irregular, as a fresh proclamation ought to have been issued, and an enquiry instituted as to A's share in the property, and it having appeared that A was materially injured by such irregularity, the sale was set aside. *MOHINY MOHUN DASS CHOWDREY v. BROOBUNJOY SHAH* ... 237

— **of former decree, Order made in**  
*See Res Judicata* ... 216

— **of Decree, Sale under attach-**  
**ment during subsistence of a prior**  
**attachment. See ATTACHMENT** ... 85

— **Sale of Property mortgaged**  
**by Father. See MITAKSHARA JOINT FA-**  
**MILY** ... 473

— **Sale of right and title under**  
**zuripeshgi lease—Mesne profits under decree**  
*upon zuripeshgi lease.* A decree for possession and mesne profits having been obtained upon a zuripeshgi mortgage of a certain mouzah executed in favour of M and K, the mortgagor, prior to any proceedings taken to execute the decree, obtained a judgment against M and K, and in execution of such judgment attached and sold their "rights and title under the original deed of zuripeshgi lease." The representative of M and K subsequently applied for execution of their decree so far as it related to the recovery of mesne profits. *Held*, that inasmuch as the decree had not been attached and sold, and the mesne profits depended wholly upon it, the applicant was entitled to execute the decrees for the mesne profits due thereunder. The existing rights of the judgment-debtor under the zuripeshgi only were sold. [Judgment of High Court reversed.] *GANESH LALL TEWARI v. SHAM NARAIN* ... (P. C.) 533

- Execution Sale.** See PRACTICE ... 231
- Executor by implication—Succession Act, X of 1865, section 182—Jurisdiction of High Court under section 264 of the Succession Act.]** A testator by his will directed A. to remain in possession of his whole estate for nine years, and at the expiry of that period to distribute the estate among certain legatees in a manner prescribed. He also directed that A. should, during the nine years, discharge all debts and receive all assets due to the estate. *Held*, following the case of *In the Goods of Baylis, L. R., 1 P. and M., 21*, that A. was an executor, and, as such, entitled to probate of the will. Where a District Judge erroneously referred a matter relating to probate, under section 617 of the Code of Civil Procedure, the High Court, acting under the concurrent jurisdiction, accorded to it by section 264 of the Succession Act, treated the matter as if originally brought before it. *MONOHUR MOOKHERJEE, IN THE MATTER OF* ... 228
- Ex-parte decree, Application to set aside—Act VIII of 1859, section 119—Act X of 1877, section 108—“Sufficient cause for not appearing”—Guardian, Non-appearance of.]** An ex-parte decree having been granted in a suit against A. personally and as guardian of her infant sons, the infants subsequently applied under section 119 of Act VIII of 1859 to set aside the decree, on the ground that the summons had not been duly served. It was proved that the summons had been duly served upon A, and the application was dismissed. On appeal to the High Court, *held*, that although so far as the decrees made A. personally liable, the Court had no power to interfere, yet as the infants were not responsible for their non-appearance, it might be said that they had been prevented by “sufficient cause from appearing,” and that the decrees might be set aside under section 119 of Act VIII of 1859 (cf. Act X of 1877, section 108) as against them. *KESHO PERSHAD v. HIRDAY NARAIN* ... 69
- Expectancy of infant, Alienation of.** See GUARDIAN, SALE OF EXPECTANCY BY ... 528
- “Fact.”** See EVIDENCE ACT, SECTIONS 3, 11, 13, 40, 42, AND 43 ... 439
- Final order on review as to costs.** See REVIEW ... 575
- Fishery, Right of.** See JULKUR RIGHT ... 269
- Forma Pauperis, Petition to sue in.** See PRACTICE ... 223
- Fractional Share of Rent of Landlord, Determination of.** See CO-SHARERS, SUIT FOR RENT BY ONE OF SEVERAL ... 402
- Full Bench Rulings—Confession—Criminal Procedure Code (Act X of 1872), sections 122 and 346.]** Two accused persons, on being arrested, were forwarded in custody to a Magistrate who had jurisdiction in the matter with which they were charged, and who afterwards conducted the preliminary enquiry, and committed them to the Court of Sessions. Before the Magistrate each made a confession, but neither of them attested his confession by his signature or mark. *Held*, that the confessions, although the Magistrate had noted that they were taken under section 122 of the Code of Criminal Procedure, must be regarded as having been taken in the course of a preliminary enquiry, and that the provisions of section 346, allowing the evidence of the Committing Magistrate to be taken, applied. *Per Curiam*.—Section 122 contemplates and provides for cases in which confessions are recorded by a Magistrate other than the Magistrate by whom the case is to be enquired into or tried. *EMPRESS v. ANAATHRAM SINGH* ... 297
- 2.—Rent, Apportionment of by purchaser from one of several joint owners—Co-sharers, Effect of sale by one of several—Procedure—Parties—Severance of tenure.]** A sale of a share of a tenure which has been let to a tenant in its entirety does not of itself effect a severance of the tenure or an apportionment of the rent, and in the absence of any such severance or apportionment, the tenant is justified in paying the entire rent as before to all the parties jointly entitled to it. If the purchaser, whether the sale be a private one or in execution of a decree, desires to effect a severance of the tenure and an apportionment of the rent, he must give the tenant due notice; and, if an amicable apportionment of the rent cannot be made by arrangement between all the parties concerned, he may bring a suit against the tenant for the purpose of having the rent apportioned, making all the other co-sharers parties to the suit. *SEENATH CHUNDER CROWDHY v. MOHESH CHUNDER BANERJEE, 1 C. L. R., 453* considered and approved. *ISHUR CHUNDER DUT v. RAMKRISHNA DUT* ... 421
- 3.—Evidence Act (I of 1872), sections 3, 11, 13, 40, 41, 42, 43—Judgments and decrees in former suits—“Transaction”—“Fact.”]** Where the question at issue was whether the plaintiff was entitled to succeed as heir to B, and the issue was dependent upon whether or not S. survived M. the plaintiff relied upon a judgment in a former suit between the defendant and a third party, in which the question whether S. survived M. was decided in the affirmative. *Held* by the Full Bench (*MITTER, J., dissentiente*), that the judgment in the former suit was neither a fact within the meaning of section 11 nor a transaction within the meaning of section 13 of the Evidence Act, and that it was inadmissible in evidence in the present suit. *GUJRU LALL v. FUTER LAL* ... 439
- 4.—Mitakshara joint family—Alienations of ancestral property by**

**Full Bench Rulings—continued.**

**father—Legal necessity for alienation—Immoral purposes, Alienations by father for—Execution sale of property mortgaged by father—Notice—Adult sons—Minor sons—Mortgage of joint property—Antecedent debt—Karta—Parties to suit.]** In the case of a Mitakshara family consisting of a father and a minor son, where the father (being the manager) has raised money by mortgaging certain ancestral family property, it not being proved on the one hand, that there was any legal necessity for his raising the money, nor, on the other, that the money was raised or expended for immoral purposes, or that the lender made any inquiry as to the purpose for which it was required, the lender cannot, in a suit against both father and son, enforce the mortgage itself upon which the money was raised; but, the debt being an antecedent debt within the rulings of the Privy Council, he is entitled to a decree directing the debt to be raised out of the whole ancestral estate inclusive of the mortgaged property. On the father's death in such case, the minor son being an only son, the lender would be entitled to a similar decree against him. If under the above circumstances the lender should have sued the father alone, and obtained a decree for payment and for sale of the mortgaged property, and at the sale should have bought the property himself, he cannot be considered as a *bona fide* purchaser for value, and is not entitled as against the infant son to the property, except to the extent of the father's interest, either during the life or after the death of the father. If, in the case first stated, the son had been an adult at the time of the raising the money and the giving of the mortgage bond, the lender would have been entitled to a decree directing, as in that case, the debt to be raised out of the whole ancestral property. In a Mitakshara joint family, consisting of two brothers and their sons, the former, being the managers, raised money by executing a zuripeshgi lease of specific family property, the lenders making no enquiry as to the necessity for the loan. Immediately thereafter the two brothers took a sub-lease at a rent of the same property from the zuripeshgidar, and continued in possession, and zuripeshgi and the sub-lease being merely a device by the two brothers to raise money and to continue in possession of the property. The rent not having been paid, a suit was brought by the zuripeshgidar, and in execution of a decree therein obtained the property was sold, the zuripeshgidar becoming the purchaser and obtaining possession. *Held*, that it not being shown for what purpose the money was raised, the sons, if not made parties to the suit, would be entitled to recover their shares against the purchaser. **GRIDHARI LALL v. KANTO LALL, and MUDDUN THAKOOR v. KANTO LALL, L. R., 1 I. A., 321; and RAM SANAI v. SHEO PRESHAD SINGH, 4 C. L. R., 226 (P. C.); (Nominis) SURAJ BUNAI KORE, I. L. R.,**

**Full Bench Rulings—continued.**

5 Cal., 148, and L. R., 6 I. A., 99, considered. **LUCHMUN DAS v. GIRDHAR CHOWDHRY ... 473**

**5. ————— Mitakshara—Sapinda, Definition of—Mitakshara, Chap. II, section 5, verse 2—Oblations, Connection by funeral—Particles of same body, Connection by—Consanguinity—Spiritual benefit.]** The word "sapinda" in verse 2, section 5, Chap. II of the Mitakshara is used not in the sense of "connection by funeral oblations," but of "connection by particles of one body" as defined in Achar Kanda (the Chapter on rituals), and, that being so, the deceased's sister's daughter's son must be taken to be a "sapinda," and as such entitled to inherit the estate. In order to determine whether a person is a "sapinda" of the prepositus within the meaning of the definition in Achar Kanda, it is necessary to see whether he and the prepositus are related as "sapindas" to each other, either directly, through themselves, or through their mothers and fathers. **UMAIR BAHADUR v. UDOL CHAND ... 500**

**Guardian, Non-appearance of. See Ex parte DECREE, APPLICATION TO SET ASIDE ... 69**

**————— Sale of expectancy by—Infant, Power of Guardian to alienate property of.] Quare.—**Whether a mere expectancy can be the subject of a sale; and if so, of a sale by a guardian, acting or purporting to act on behalf of an infant. **DOOLICHAND v. BIRL BROOKUN LAL AWASTI ... (P. C.) 528**

**Guardianship, Mahomedan Law of. See MAHOMEDAN LAW ... 413**

**Gomashta. See INSOLVENCY ... 382**

**"Heira." See HINDU LAW ... 153**

**High Court, Jurisdiction of, under Act 264 of the Succession Act. See EXECUTOR BY IMPLICATION ... 228**

**Hindu Law—Adoption—Sudra adoption—Ceremonies.]** Among Sudras in Bengal no ceremonies in addition to the giving and taking of the child are necessary to constitute a valid adoption. [Judgment of the High Court affirmed.] **INDROMONI CHOWDHURANI v. BEHARI LALL MULLICK ... (P. C.) 183**

**2. ————— Adoption (of grandson of cousin)—Dattaka Chandrika, section II, paras. 7 and 8—Dattaka Mimansa, section V, para. 20—"Reflexion of a son."] The rule deduced from the Dattaka Mimansa, section V, para. 20, and Dattaka Chandrika, section II, paras. 7 and 8, that a person cannot be validly adopted with whose mother the adoptive father might not have lawfully intermarried while she was yet unmarried, does not prevent the adoption of a cousin's grandson. **MINO MORE DEBIAN v. DEBOY****

**Hindu Law—continued.**

**ISRO GOSSAMER, W. R., Sp. No., p. 122, following.** The meaning of the words "reflexion of son," Dattaka Mimamsa, section V, para. 20, and Dattaka Chandrika, section II, paras. 7 and 8, discussed. **HUREAN CHUNDER BANERJEE v. [JERO MOHUN CHUCKERBUTTY ... 393**

**—Alienation by widow of houses built on income of husband's Estate—Widow, alienation by.]** A Hindu widow has no power to sell a house erected by her out of savings of her income on land inherited from her husband. **AKIRA DOBRY v. GOPI LALL ... 68**

**—Compromise of Suit by widow—Adoption—Evidence.]** In a suit in which a claim was made, in virtue of an alleged adoption, to the estate of a deceased Hindu, the widow made a compromise, which was not in writing, with the claimant, wherein the adoption was admitted, but alleged to have been on condition that the widow should enjoy the entire property for her life without power of alienation, and that, after her death, her minor daughters should take the self-acquired property, and that the claimant should succeed to the ancestral estate. **Held**, that the daughters could not, under any circumstances, be bound by the compromise. The evidence to establish such a conditional adoption, as that alleged, must, as in the case of nuncupative will, be very strong. [Judgment of the High Court reversed on the facts.] **IMRIT CHANWUR v. ROOP NARAIN SINGH ... (P.C.) 76**

**—Impartible Raj, Resumption and Grant of, by Government—Divisibility—Sunud, Construction of—"Heirs."]** In 1783, an impartible raj was confiscated by the Government on account of the rebellion of the then zamindar. In the following year it was restored to the eldest son of the former zamindar as it existed prior to the confiscation. In 1793, the state was again resumed by the Government for arrears of revenue, and in 1802, two new zamindari were carved out of it, one of which was granted to the second son of the zamindar who was deprived of possession in 1783, at a fixed revenue. The sunnud, by which the grant was created, contained *inter alia* the following clauses:—"You shall be at full liberty to transfer, without the previous consent of Government or any other authority, to whomsoever you may think proper, either by gift, sale, or otherwise your proprietary right in the whole or in any part of your zamindari."

\* \* \* \* \* Continuing to perform the above stipulations, and to perform the duties of allegiance to Government, you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns, at the permanent assessment herein named." **Held** (reversing the decision of the High Court), that the word heirs in the sunnud

**Hindu Law—continued.**

must be construed to mean the heirs of the grantee, according to the ordinary rules of inheritance of the Hindu Law, and not a single heir according to the rule of primogeniture which formerly obtained in the seminary. **BAROO BHEE PERTAB SAHNE v. MOHARAJAH RAJENDER PERTAB SAHNE, 12 Moore's L. A., 1, distinguished. VENKATA NARASIMHA APPA ROW v. NARAYYA APPA ROW ... (P.C.) 153**

**6.—Joint family property, Power of one member to mortgage for partnership debts—Karta, Power of, to mortgage family property—Partners—Equity.]** A and B, not members of a joint family, carried on a partnership business which was financed from time to time by the defendants. On the death of A, his share descended to his three sons, two of whom died intestate without issue, each leaving a widow. The business was continued, but the two widows took no part in the management of the business, the third son C, who was joint with them, acting therein, on their and his own behalf. To secure certain advances made by the defendants, C and B. mortgaged to the defendants certain immoveable properties belonging to the joint family of which C was a member, together with property belonging to B. Upon this mortgage a decree was subsequently obtained against the parties thereto, and in execution of such decree the joint family properties were sold. In a suit brought by one of the widows to have it declared that her share was not bound either by the mortgage of the decree, **held**, that the suit must be dismissed on the ground that C. had power to bind the whole property for the purpose of the business. **Held**, further, that, assuming she was not bound by the decree to which she was not a party, she was liable for her share of the debt secured by the mortgage, and could not seek to re-open the case without making in her plaint an offer to pay off her share of that debt. **RAM LALL THAKURSIDAS v. LAKSHMINATH MUNITRAM, 1 Bom. H. C. R., Appx. 51; and JOHURRA BHEE v. SREEN GOPAL MISHER, I. L. R., 1 Cal., 470, followed. BEMOLA DOSSEE v. MOHUN DOSSEE ... 84**

**7.—Money advanced for proper purposes to Hindu Widow, whether a charge on husband's estate—Marriage of husband's granddaughter.]** Money advanced to the widow of a deceased Hindu for the purposes of the marriage ceremony of the daughter of her deceased husband's son, may, on the death of the widow, be recovered from the estate of the husband in the hands of his heirs. **RAM COOMAR MITTHER v. ICHHAMOTI DASAI ... 429**

**8.—Recital—Admission—Widow, Enlargement of estate of—Limitation Act, IX of 1871, Sched. II, Art. 129—Adoption.]** D, a Hindu, being old and unable to manage the business of his estate which he held jointly

**Hindu Law—continued.**

with his brother, executed a deed, whereby he agreed to pay a manager to take the business off his hands. In that deed he described his wife, who was a *purda nashin* lady, as being joined with him as owner of the estate. *Held*, that there was no admission binding upon those claiming under D, and that the widow's estate was not enlarged to an absolute estate. The provision in Act IX of 1871, Sched. II, whereby it is enacted that with respect to suits to establish or set aside an adoption, the time when the period of limitation begins to run is "the date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father," does not interfere with the right, which but for it a plaintiff has of bringing a suit to recover possession of real property within twelve years from the time when the right accrued. *KAJ BAHADOOR SINGH v. ACHUMBIT LALL* ... (P.C.) 12

9—**Widow's Estate, Forfeiture of—[Unchastity during widowhood.]** Under Hindu Law, as administered in the Bengal School, a widow, who has once inherited the estate of her husband, is not liable to forfeit that estate by reason of her subsequent unchastity. [Judgment of the High Court affirmed.] *MONTIRAM KOLITA v. KERRY KOLITANI* ... (P.C.) 322

**Hindu Wills Act (XXI of 1870), section 2—[Wills of Hindus executed prior to September 1870—Probate.]** The only powers conferred on Mofussil Courts being in respect of Wills made on or after the 1st day of September 1870, probate of a Will, made by a Hindu prior to that date, cannot be granted by a Mofussil District Court. *LUCHMAN BHARTI v. DUKHABAN BHARTI* ... 138

**Immoral purposes, Alienations by Father for.** See *MITAKSHARA JOINT FAMILY* 473

**Impartible Raj, Resumption and Re-grant of, by Government.** See *HINDU LAW* 153

**Indemnity, Contract of.** See *ASSIGNMENT OF LEASE* ... 167

**Indian Penal Code (Act XLV of 1860), sections 196 and 471—[Jurisdiction of Magistrate.]** A Magistrate has no power, under section 196 of the Indian Penal Code, to convict an accused person who has been found to have used as evidence a document which he knew to be a forgery, but is bound to commit him to the Court of Session, the offence being properly cognizable under section 471 of that Code. *REG. v. OODERN LALL, S W. R., Cr. Rul. 17, disapproved of.* *KHERODE CHUNDER MOZUMDAR, IN THE MATTER OF* ... 118

**sections 213, 214, and 406—[Compounding offences.]** The offence of criminal breach of

**Indian Penal Code—continued.**

trust, under section 406 of the Indian Penal Code, cannot, under the terms of sections 213 and 214 of the same Code, be lawfully compounded. *IN THE MATTER OF A REFERENCE FROM THE CHIEF PRESIDENCY MAGISTRATE* 392

**Infant, Power of Guardian to alienate Property of.** See *GUARDIAN, SALE OF EX-PROTANCY BY* ... 528

**Insolvent Act (Stat. 11 and 12 Vict., C. 21) section 59.** See *SET-OFF* ... 294

**Insolvent, Application to be Declared.** See *CIVIL PROCEDURE CODE, ACT X OF 1877, SECTIONS 344, 351, 554, 588 (17)* ... 135

—**Order refusing application to be Declared.** See *CIVIL PROCEDURE CODE (ACT X OF 1877), SECTIONS 344, 351, 554, 588 (17)* ... 135

**Insolvency—Adjudication—Gomashta—Trader living beyond the jurisdiction, but carrying on business by a Gomashta within the jurisdiction—Stat. 11 and 12 Vic., cap. 21, section 9—[Practice—Affidavit, Time for filing.]** A trader, residing out of the jurisdiction of the High Court, but carrying on business at Calcutta by a Gomashta, can be adjudicated an insolvent under section 9 of 11 and 12 Vic., cap. 21, if his Gomashta stops payment and closes, and leaves his usual place of business, or does any act, which, if done by the trader himself, would have rendered him liable to be adjudicated an insolvent. An affidavit, intended to be used to oppose, or show cause against a motion or petition, is filed in time, if filed on or before the sitting of the Court on the day that cause is in fact shown, although not filed before the sitting of the Court on the day for which notice was given. A party intending to use an affidavit to oppose, or show cause against a motion or petition, is not bound to give any notice to the other side. *HUBBUCK CHAND GOLCHA, IN RE* ... 303

**Interest on Means Profits, Calculation of.** See *MEANS PROFITS, LIABILITY OF ACTUAL OCCUPIER AND OF HIS LESSOR* ... 357

—**Acceptance of in advance.** See *PRINCIPAL AND SURETY* ... 591

—**Rate of, when not specified in Decree.** See *PRACTICE* ... 331

**Intention of Parties.** See *LIMITATION OF BOND, PAYABLE ON 30TH POUJ IN A YEAR WHEN THAT MONTH CONTAINED ONLY 29 DAYS* ... 553

**Irregularity in Execution Sale.** See *EXECUTION OF DECREE AGAINST ONE JUDGMENT-DEBTOR PENDING APPEAL BY ANOTHER* 237

—**in trial.** See *CRIMINAL PROCEDURE CODE (ACT X OF 1872), SECTIONS 259 AND 265* ... 521

**Issues raised.** See RENT, SUITS FOR, UNDER A SETTLEMENT ... 208

**Joint Judgment-Debtor, Release of one.** See CONTRACT ACT (IX OF 1872), SECTION 44 ... 212

— family property, Power of one member to mortgage for partnership debts. See HINDU LAW ... 34

— Trespass. See MESNE PROFITS, LIABILITY OF ACTUAL OCCUPIER, AND OF HIS LESSOR ... 357

**Judgment.** See LIMITATION ACT (IX OF 1871), SCH. II, ART. 145 ... 71

— and Decrees in former suits. See EVIDENCE ACT (I OF 1872), SECTIONS 3, 11, 13, 40, 41, 42, AND 43 ... 439

— in former suit against one of several Co-sharers. See CIVIL PROCEDURE CODE (ACT X OF 1877), SECTION 13, EXPLANATION V ... 516

**Julkur Right—Fishery, Right of—Easement, Definition of—Limitation Act, XV of 1877, sections 3 and 26.]** A right of fishing is an easement within the meaning of section 3 of the Limitation Act (XV of 1877), and a prescriptive right to such an easement can only be acquired by an uninterrupted user for 20 years. *CHUNDI CHURN ROY v. SHIB CHUNDER MUNDOL* ... 269

— Restrictions upon.—The owners of the bed of a river, when dry, are not entitled so to use that bed as to injure the julkur rights which others have in it when full, by restricting the area over which the water may flow. *SHIKANT BHUTTACHARJI v. KEDAR NATH MOOKHERJEE* ... 242

**Jurisdiction—Cause of action arising out of jurisdiction—Civil Procedure Code, Act X of 1877, section 17—Permanent Residence—Onus of Proof.]** Where the cause of action arises in the jurisdiction of a Court other than that in which the suit is brought, the plaintiff must, under the provisions of section 17 of Act X of 1877, show that the defendant, at the time of the commencement of the suit, actually and voluntarily resided or carried on business, or personally worked for gain, within the jurisdiction of the Court in which the suit was brought. *MODHU SOODUX CHOWDHRY v. S. COCH-RANE* ... 417

— in Proceedings to enforce decrees. See LIMITATION ... 561

— of Court of Small Causes. See ACT XI OF 1865, SECTION 6 ... 487

— of High Court under section 264 of the Succession Act. See EXECUTION BY IMPLICATION ... 228

**Jurisdiction of Magistrate.** See INDIAN PENAL CODE (ACT XLV OF 1860), SECTIONS 196 AND 471 ... 118

— See CIVIL PROCEDURE CODE (ACT X OF 1877), SECTION 623 ... 234

— See *Res-Judicata* ... 305

—, Waiver of. See CRIMINAL PROCEDURE CODE, SECTIONS 72 AND 84, 462

**Juror, Removal of.** See CRIMINAL PROCEDURE CODE, SECTIONS 521, 523, AND 532 ... 379

**Jury, Duty of, under section 523 of the Criminal Procedure Code.** See CRIMINAL PROCEDURE CODE, SECTIONS 521, 523, AND 532 ... 379

— Verdict of. See CRIMINAL PROCEDURE CODE ... 349

**Karta, Power of, to mortgage family property.** See HINDU LAW ... 34

— See MITAKSHARA JOINT FAMILY 473

**Lakhiraj Title.** See ACT VIII (B.O.) OF 1869, RESUMPTION PROCEEDINGS UNDER ... 260

**Lease.** See ASSIGNMENT OF LEASE ... 167

— Registration—Tabular Statement signed by a tenant—Evidence.] A tabular statement, to which the tenants affixed their signature, and which contains the year and date, the name of the tenant, the number of the holding, and the amount of rent for the several years, disbursements and balance due, is not a lease, and does not require to be stamped or registered. *GUNGAPERSAD v. GOGUN SING, I. L. R., 3 Cal., 322, followed. NARAIN CUMARI v. RAM KRISHNA DAS* ... 286

**Legal Necessity for alienation.** See MITAKSHARA JOINT FAMILY ... 473

**Letters Patent, section 18.—Transfer of suit to High Court.]** Where all the parties and the witnesses to a suit instituted in the Court of the Subordinate Judge of H, where the cause of action arose, resided in Calcutta, and it appeared that it would be cheaper to have the case tried in Calcutta, the High Court, on the consent of all the parties, save one, who did not oppose the application for transfer, directed the suit to be transferred to the High Court. *PAYN v. ADMINISTRATOR-GENERAL* ... 221

**Liability of ultimate Assignee to indemnify a Mesne Assignee against breach of Covenant.** See ASSIGNMENT OF LEASE ... 167

**Lien of Solicitors.** See SOLICITOR ... 406

— See MORTGAGE, EXECUTION OF MONEY DECREES UPON ... 370

**Limitation—Appeal by one of several defendants against decrees—Decree for costs, Execution of, against defendants who have not appeal.**

**Limitation—continued.**

ed.] One of several defendants, jointly liable under a decree, having appealed to the District Court, the decree was reversed, but on second appeal the original decree was restored by the High Court. Under the original decree, the defendants who did not appeal were made liable for costs. *Held*, on an application made more than three years after the date of the original decree for execution of the decree so far as it directed payment of costs, that limitation must be taken to run not from the date of the original decree, but from the date of the decree of the High Court. **HURO PERSHAD ROY v. ENAYET HOSSAIN**, 2 O. L. R., 471, cited and distinguished. **MULIK AHMED ZUMKAN v. MAHOMED SAYED** ... 578

2. — **Act XIV of 1859, section 1, sub-section 13—Maintenance.** A testator, who died in 1855, bequeathed all his property to his eldest son by his will, which contained the following provision: "He (the eldest son) shall provide for both mothers, treating them with great respect, and he shall regard each of his two younger brothers as a son, providing for them, and my own servants in a manner befitting their several conditions in life." In 1871 one of his widows brought an action for maintenance and arrears of maintenance. *Held*, that the maintenance was not made a charge upon the estate, and that consequently the suit was not barred under Act XIV of 1859, section 1, sub-section 13. By common law the right to maintenance is a right accruing from time to time according to the wants and exigencies of the person entitled to claim it. **NARAYANRAO RAM CHANDRA PANT v. RAMABAI** ... (P.C.) 163

**Limitation Act, IX of 1871, Schedule II, Art. 46—Act XV of 1877, Schedule II, Art. 47—Possession, Orders for, under Criminal Procedure Code—Evidence in case of reformation of chur lands.]**

Certain chur lands, which had been submerged, having re-formed, were claimed by a number of parties. In a proceeding under section 318 of Act XXV of 1861, the Magistrate, in January 1871, directed possession to be given to certain persons known as the Roys. In 1872 the present appellants instituted a suit against the Roys to set aside the order of the Magistrate, and, on the 16th December 1873, obtained a decree in the High Court, under which possession was given on the 10th July 1874. In 1874, more than three years after the Magistrate's order, the plaintiffs instituted two suits against the Roys, and the appellants, for possession of the lands made over to the latter under the decree of 1873. *Held*, that these suits were not barred by Limitation under Art. 46, Schedule II of the Limitation Act, IX of 1871, cf. Act XV of 1877, Schedule II, Art. 47. That article can only apply between the parties whose possession has been confirmed by the Magistrate, and each one of the parties to that proceeding

**Limitation Act—continued.**

who claimed against them. It does not apply in favour of one of the parties who has subsequently succeeded by regular suit in ousting the parties put in possession by the Magistrate. **DUMSARAM ROY v. RAJAH NURSING DEB**, 3 B. L. R., A. C., 254; and **CHINTAMANI v. ISWAR CHUDRA**, 3 B. L. R., Appx., 123, cited. The evidence to be produced, and the onus of proof in cases of re-formed chur lands, discussed. **AUXILL CHUNDER CHOWDERY v. MIRZA DELAWAR HOSSEIN** ... 93

IX of 1871, Sched. II, Art. 87—**Mutual account—Reciprocal demands.** In 1869 defendants paid Rs. 1,200 into the plaintiff's bank, and at the end of the year there was a balance still due to him. On the 31st January 1870, that balance had been withdrawn, and there was then a sum due upon the account from the defendant to the plaintiff. From that time up to September 1873, except on a few particular dates, the account continued to be against the defendant. The last date upon which there was a balance due to the plaintiff was the 2nd of July 1872, although subsequent payments, the last of which was on the 12th June 1873, had been made in reduction of that balance. In December 1876, the plaintiff sued to recover the amount due upon the account. *Held*, that even supposing the accounts between the parties to be mutual accounts, and that they were open and current until they were stopped, they could only be mutual down to the 12th June 1873, and that as it could not be said there were reciprocal demands after the 2nd July 1872, or at latest after the payment in June 1873, the suit was barred by Art. 87 of the Limitation Act, IX of 1871, Schedule II. **ASHKERY KHAN v. ASHRUF-KUNMISSA** ... 112

IX of 1871, Sched. II, Art. 129—**Adoption, Suit to set aside.** Plaintiff sued in 1877 to set aside an adoption which was alleged to have taken place twenty years before, and, as heir of the husband of the last Adhikar, who died in 1832, to obtain possession of a certain temple and properties attached thereto which the defendant claimed under the said adoption. *Held*, on the authority of **RAI BAHADOOR SINGH v. ACHUMBIT LAL**, L. R., 6 I. A., 110 (S. O.) 6 Cal. L. R., 12—that the suit was not barred by Art. 129, Sched. II of Act IX of 1871. **PURNA NARAIN ADHIKAR v. BHMOKANT ADHIKAR** ... 45

IX of 1871, Sched. II, Art. 129. See **HINDU LAW** ... 12

IX of 1871, Sched. 2, Art. 145—**Adverse possession—Judgment—Appeal.** In 1839 a butwara was made of an estate which up to that time had been held jointly in the following shares:—The plaintiff 10 annas, his father 2 annas, and his brother the remaining 4 annas, and under the butwara different

**Limitation Act—continued.**

villages were distributed, each party taking certain specified villages as his share. In 1842 the father died, his share having in the meantime, in some way, become vested in the plaintiff. In 1856 execution was issued against the 4 annas share of the plaintiff's brother, who resisted the execution, and in 1858 a suit was instituted by the judgment-creditor to enforce his rights, the present plaintiff being joined a defendant with his brother. In this suit it was decided, in 1860, that the butwara was not binding on the judgment-creditor, and that he was at liberty to take a 4 annas share of the rents of all the villages divided under the butwara, and in 1863 this judgment was, on appeal by the brother, affirmed. The decree was not executed till July 1864. In 1873 the plaintiff filed the present suit to establish his right to receive his 12 annas share. *Held*, that there was no adverse possession against the plaintiff until the appeal in the other suit was dismissed in 1863, and, therefore, that the suit was not barred. *Per Curiam*.—It cannot be said that the plaintiff was bound to assert his right, in 1860, because S. (the brother) having appealed against the decree, there was a possibility of its being reversed or altered. (Judgment of the High Court reversed.)—**MANWAR ALI v. UNNODO PERSHAD ROY** ... .. (P.O.) 71

**XV of 1877—Limitation, Principle of law of.]** The provisions of the Limitation Act cannot be applied to any proceeding which at the time of its becoming law was barred by the law of limitation which was then in force, unless it can be shown that such was the express intention of the Legislature. **SHUMBHU NATH SHAHA CHOWDHRY v. GURU CHURN LAHIRY** ... .. 437

**XV of 1877, "Deposit"—Loan repayable on demand.]** The word "deposit" in the Limitation Act XV of 1877, as distinguished from a loan, refers to cases where money is lodged with another under an express trust, or under circumstances from which a trust can be implied. **RAM SUKH BHUNJO v. BROHMOYI DASI** ... .. 470

**XV of 1877, sections 3 and 26.** See **JULKUR RIGHT** ... 269

**XV of 1877, section 4—Appeal, Limitation not taken in grounds of—Appeal against portion of decree—Procedure.]** Where a suit, which ought to have been dismissed under section 4 of the Limitation Act, although limitation was not set up as a defence, is not dismissed, the defendant, in order that the question of limitation may be dealt with by the Appellate Court, must appeal on the whole case. **ALIMUNNESA KHATOON v. SYED HOSSEIN ALI** ... .. 267

**XV of 1877, sections 2, 11, and 28—Act IX of 1871, sections 12 and 28—**

**Limitation Act—continued.**

**Debt—Remedy—Contract Act, IX of 1872, section 60—Decree, Questions to be determined by Court executing—Civil Procedure Code (Act X of 1877), sections 242 and 244 (c).]** Neither the Limitation Act of 1871, nor Act XV of 1877, extinguishes a debt. These acts only bar the remedy. The words "revive any right to sue," in section 2 of Act XV of 1877, should have their widest signification, and be taken to include any application invoking the aid of the Court for the purpose of satisfying a demand. According to the provisions of sections 242 and 244 (c) of the Civil Procedure Code, Act X of 1877, and the Full Bench case of **BISSESHUR MULLICK v. MAHARAJAH MAHATAB CHAND BAHADOOR**, 10 W. R. (F.B.) 8, a Court to which a decree has been transferred for execution has jurisdiction to determine whether or not such decree is barred by limitation. **LOOTPOOLAH v. KHEERU CHAND**, 21 W. R. 330, considered. **NOOOOR CHUNDER BOSH v. KALLY COOMAR BOSH**, I. L. R., 1 Cal., 338, explained. The conclusion in the case of **SHUMBHU NATH SHAHA v. GURU CHURN LAHIRY**, 6 C. L. R., 437, approved. **NURSINGH DOYAL v. HURRYHUR SAHA** ... 489

**XV of 1877, section 10, and Sched. II, Art. 120—Account, Suit for, against Trustee.]** A suit against a defendant for an account of monies received and disbursed by him as trustee appointed during the minority of the plaintiff is not a suit for the purpose of following trust property in his hands within the meaning of section 10 of the Limitation Act, XV of 1877. The limitation applicable to such a suit is that provided by Art. 120, Sched. II of that Act. English Cases of a like nature distinguished. **SHARODA PRASAD CHATTOPADHYA v. BROJO NATH BHUTTAACHARJEA** ... .. 195

**XV of 1877, Sched. II, Arts. 32 & 120.** See **DAMAGAN FOR BREACH OF COVENANT, SUIT FOR** ... 569

**XV of 1877, Sched. II, Arts. 62 and 115—Money had and received.]** Where money was deposited pending negotiations for a new lease, there being an agreement that if no lease were granted, the money should be returnable, *Held*, in a suit to recover the money deposited, on the negotiations having fallen through, that the money became money had and received by the defendant for the plaintiff's use, from the time that the negotiations fell through, and that, not Art. 115, but Art. 62 of Act XV of 1877 applied. **JHURI MAHTON v. THAKOOR NATH SAHAI** ... .. 365

**XV of 1877 Sched. II, Arts. 66 & 116.** See **BOND, LIMITATION IN SUIT UPON REGISTERED** ... .. 579

**XV of 1877, Sched. II, Art. 132—Malikana, Nature of.]** Malikana being an annually recurring charge, a suit for payment of money due in respect thereof may, under Art. 132 of Act XV of 1877, Schedule II, be brought within 12 years from the date on



**Limitation Act—continued.**

which such money became due. *HURMUZI BEGUM v. HIRDEY NARAIN* ... 183

**XV of 1877, Sched. II, Art 178—Revival of Suit, Application for.]** The Limitation Act does not apply to applications to the Court with reference to its own list of causes, such as applications to transfer a case from one board to another, or to transfer a case to the bottom of the board. *SEMBLE: Where the Court allows a suit to be re-constituted, a new right to have the case replaced upon the board accrues, and limitation runs from that time. GOBIND CHUNDER GOSSAMI v. RUNGUN MONNY DOSSEN*... 345

**XV of 1877, Sched. IV, Art. 83. See ASSIGNMENT OF LEASE** ... 167

**Limitation, Computation of period of.** See ACT VIII (B.C.) OF 1869, SECTION 29... 49

**—on bond, payable on 30th Pous in a year when that month contained only 29 days—Intention of Parties.]** Where a bond was made payable on 30th Pous 1288, it turned out that Pous of that year contained only 29 days; it was held, that limitation must be taken to run, not from the 29th Pous, but from the day following. *ALMUS BANU v. MAHOMED RAJA* ... 553

**—Proceeding to enforce decree—Jurisdiction—Bond fide.]** A proceeding for the purpose of obtaining execution of a decree taken *bond fide* and with due diligence before a Judge, whom the party instituting the proceeding *bond fide* believes, though erroneously, to have jurisdiction, specially when the Judge himself also supposes that he has jurisdiction, and deals with the case accordingly, is a proceeding to enforce the decree within the meaning of section 20 of Act XIV of 1859. Compare Act XV of 1877. *ROY DHUNPUT SINGH v. MUDHOMUTTEE DEBIA*, 11 B. L. R., (P. C.), 23. *HERA LALL v. BUDDRI DASS* (P. C.) ... 561

**—Principle of Law of.** See LIMITATION ACT (XV OF 1877) ... 437

**—See ACT VIII (B. C.) OF 1869, RESUMPTION PROCEEDINGS UNDER** ... 260

**—See ACT VIII (B. C.) OF 1869, SECTION 27** ... 494

**—See ACT VIII (B. C.) OF 1869, SECTION 28** ... 301

**—See AGENT, TERMINATION OF AUTHORITY OF** ... 101

**—See BIRT TENURES** ... 146

**—See CIVIL PROCEDURE CODE (ACT X OF 1872), SECTION 32** ... 62

**—See PRACTICE** ... 239

**—See REGISTRATION ACT, SECTIONS 17 (H) AND 23** ... 136

**Limitation—Symbolical possession—Act XI of 1859, section 29—Arrears of Government Revenue, Sale of land for.]** Where land is sold under Act XI of 1859, for arrears of Government Revenue, the purchaser who has been put in symbolical possession by the proclamation of the Collector, is entitled to sue for actual possession of the land within 12 years from the date of such symbolical possession. *JUGGOSUNDHU MUKERJEE v. RAM CHUNDER BYSACK*, 5 C. L. R., 548, followed. *MOZUFFER WAHID v. ABDUS SAMAD*... 539

**Loan repayable on demand.** See LIMITATION ACT, XV OF 1877 ... 470

**Mahomedan Law—Suit by uncle as next friend of infant—Guardianship, Mahomedan Law of.]** The rule of Mahomedan Law that an uncle cannot be the guardian of the property of a minor, does not prevent an uncle representing his infant nephew, under the Code of Civil Procedure, as next friend in a suit. *ABDUL BARI v. RASH BAHARI PAL* ... 413

**—Will.** See PROBATE ... 391

**Maintenance.** See LIMITATION... 163

**Malikana, Nature of.** See LIMITATION ACT (XV OF 1877), SCHED. II, ART. 132... 133

**Marriage of deceased Husband's Grand Daughter.** See HINDU LAW ... 429

**Map, Presumption of accuracy of.** See EVIDENCE ACT (I OF 1872), SECTION 83 ... 519

**—made by Government. Effect of cancellation of.** See EVIDENCE ACT (I OF 1872), SECTION 83 ... 519

**Measurement Papers prepared by Butwara Ameen.** See EVIDENCE ACT (I OF 1872) ... 139

**Mesne Profits, Liability of actual occupier and of his lessor for—Joint trespass—Interest on Mesne profits, Calculation of.]** Where lands are wrongfully withheld from the rightful owner, not only the actual occupiers but also the person who has leased the land to the actual occupiers, may be held to have committed a joint trespass and to be jointly liable for the damages caused by such trespass. *DON v. HARLOW*, 12 Ad. and Ell., 40, followed. Interest on mesne profits may be allowed from the commencement of the suit at the annual rate allowed by the Court. *HURROFFERSAUD ROY v. SHAMAPERSAUD ROY*, 1 L. R., 3 Cal. (P. C.), 654 (S. C.) 1 C. L. R., 499, followed. *MURTHY MOHUN SINGH v. RAM DASS CHUCKERBUTTY* ... 357

**—under decree upon Zurbeghi lease.** See EXECUTION SALE OF RIGHT AND TITLE UNDER ZURBEGHI LEASE ... 533

**Minor—Act XL of 1858—Appeal from order under section 18 of Act XL of 1858—Certificate withheld under certain circumstances.]** An application for a certificate under Act XL of 1858 ought not to be granted when there is a minor who has almost attained his majority, unless, under special circumstances, as where very great weakness of mind in the minor is proved, or where it is shown that there is some absolute necessity for the certificate being granted. Under section 18 of Act XL of 1858, an appeal is allowed to any person injured by an order under the Act. **MUHAMMAD BEGUM v. NAZIRUN** ... .. 210

— **Sons.** See **MITAKSHARA JOINT FAMILY** ... .. 473

**Mis-direction—Evidence Act (I of 1872), section 54—Previous convictions.]** In a trial before a Jury, where the accused was charged with being in possession of certain articles alleged to have been stolen, and which were found in his house, the complainant and another witness identified the articles as belonging to the former, but the accused claimed the property as his own. The Sessions Judge, in charging the Jury, said:—"The fact that he (the accused) has been twice imprisoned for theft is also not without its weight, and should be taken into consideration when deciding as to the reliability of the evidence of identification." *Held*, that this was a mis-direction, as the evidence of the previous conviction to prove bad character was irrelevant and inadmissible. *Per Curiam*.—The proper object of using previous convictions, except under special circumstances, is to determine the amount of punishment to be awarded, should the prisoner be convicted of the offence. **ROSHAN DOSADH v. EMPRESS** ... 219

**Mitakshara, Chap. II, section 5, verse 3.**  
See **MITAKSHARA** ... .. 500

— **Joint Family—Alienations of ancestral property by father—Legal necessity for alienation—Immoral purposes, Alienations by father for—Execution sale of property mortgaged by father—Notice—Adult sons—Minor sons—Mortgage of joint property—Antecedent debt—Karta—Parties to suit.]** In the case of a Mitakshara family consisting of a father and a minor son, where the father (being the manager) has raised money by mortgaging certain ancestral family property, it not being proved on the one hand that there was any legal necessity for his raising the money, nor, on the other, that the money was raised or expended for immoral purposes, or that the lender made any inquiry as to the purpose for which it was required, the lender cannot, in a suit against both father and son, enforce the mortgage itself upon which the money was raised; but, the debt being an antecedent debt within the rulings of the Privy Council, he is entitled to a decree directing the debt to be raised out of the whole

**Mitakshara Joint Family—continued.** ancestral estate, inclusive of the mortgaged property. On the father's death in such case, the minor son, being an only son, the lender would be entitled to a similar decree against him. If under the above circumstances the lender should have sued the father alone, and obtained a decree for payment and for sale of the mortgaged property, and at the sale should have bought the property himself, he cannot be considered as a *bona fide* purchaser for value, and is not entitled as against the infant son to the property, except to the extent of the father's interest, either during the life or after the death of the father. If, in the case first stated, the son had been an adult at the time of the raising the money and the giving of the mortgage bond, the lender would have been entitled to a decree directing, as in that case, the debt to be raised out of the whole ancestral property. In a Mitakshara joint family, consisting of two brothers and their sons, the former being the managers, raised money by executing a *zuripeshgi* lease of specific family property, the lenders making no enquiry as to the necessity for the loan. Immediately thereafter the two brothers took a sub-lease at a rent of the same property from the *zuripeshgidar*. **LUCHMAN DASS v. GHADHUR CHOWDHRY** ... .. (F. B.) 473

**Mitakshara—Sapinda, Definition of—Mitakshara, Chap. II, section 5, verse 3—Oblations, Connection by funeral—Particles of same body, Connection by—Consanguinity—Spiritual Benefit.]** The word "sapinda" in verse 3, section 5, Chap. II. of the Mitakshara is used not in the sense of "connection by funeral oblations," but of "connection by particles of one body" as defined in *Achar Kanda* (the Chapter on rituals), and, that being so, the deceased's sister's daughter's son must be taken to be a "sapinda," and as such entitled to inherit the estate. In order to determine whether a person is a "sapinda" of the prepositus within the meaning of the definition in *Achar Kanda*, it is necessary to see whether he and the prepositus are related as "sapindas" to each other, either directly, through themselves, or through their mothers and fathers. **UMAID BAHADUR v. UDOI CHAND** ... .. (F. B.) 500

**Mortgage—Account, Contract by mortgagee to be relieved from obligation to—Regulation XXXIV of 1803, sections 9 and 10.]** In a mortgage executed in 1852, while Regulation XXXIV of 1803 was in force, the mortgagor contracted that he should not have any right or claim to an account of moneys profits during the time of the mortgagee's possession. *Held*, that the contract was binding, notwithstanding the provisions of sections 9 and 10 of that Regulation imposing an obligation on the mortgagee to account. **BUDRI PARSAD v. MURLIDHAR** ... .. (P. C.) 257

**Mortgage, Execution of money decree upon—***Lien.*] A suit having been instituted in the district of B, while Act VIII of 1859 was in force, upon a bond under which lands, both in the district of B and the district of P were mortgaged, a decree was given which, it was declared, should be satisfied by the sale of the whole mortgaged property. No permission was granted by the High Court, as required by that Act, to institute the suit at B. *Held*, that, although by reason of the permission of the High Court not having been obtained as required, the decree must as regards the property in the district of P, be regarded as a money decree only, and could not be executed by sale of the lands in that district, the plaintiff was entitled by a separate suit to enforce his mortgage lien against the property in the Patna district in the hands of a purchaser whose purchase was subsequent to his mortgage. *BOLAKI LAL v. THAKUR PARTAN SINGH* ... 370

**Mortgage of Joint Property.** See MITAKSHARA JOINT FAMILY ... 473

**Mortgages, Interest of.** See REGULATION VIII OF 1819, SECTIONS 13 AND 17 ... 28

**Money advanced for proper purposes to Hindu widow, whether a charge on Husband's estate.** See HINDU LAW 429

**Money had and received.** See LIMITATION ACT, XV OF 1877, SCH. II, ARTS. 62 AND 115 ... 355

**Mutual Account.** See LIMITATION ACT, IX OF 1871, SCH. II, ART. 87 ... 112

**Mutual Credit.** See SET-OFF ... 294

**Notice.** See AGENT, TERMINATION OF AUTHORITY OF ... 101

— See ENHANCEMENT OF RENT ... 362

— See MITAKSHARA JOINT FAMILY.. 473

**New Trial.** See SMALL CAUSE COURT ACT, XI OF 1865, SECTION 21 ... 549

**Oblations, Connection by funeral.** See MITAKSHARA ... 500

**Obstruction to thoroughfare or public place.** See CRIMINAL PROCEDURE CODE, SECTIONS 521, 523 AND 532 ... 379

**Onus.** See JURISDICTION ... 417

**Order of Remand.** See *Res Judicata* ... 121

**Parties Added.** See CIVIL PROCEDURE CODE (ACT X OF 1877), SECTION 32 ... 62

**Parties entitled to sue.** See CHARITABLE OR RELIGIOUS TRUSTS UNDER A WILL, SUIT TO ENFORCE ... 58

**Parties.** See ACT VIII (B.C.) OF 1869, RESUMPTION PROCEEDINGS UNDER ... 260

**Parties.** See CRIMINAL PROCEDURE CODE (ACT X OF 1872), SECTION 530 ... 193

— See RENT, APPORTIONMENT OF, BY PURCHASER FROM ONE OF SEVERAL CO-SHARERS ... 421

**Parties to Suit.** See MITAKSHARA JOINT FAMILY ... 473

**Partners.** See HINDU LAW ... 34

**Parties of same body, Connection by.** See MITAKSHARA ... 500

**Pauper, Defence by in forma pauperis—***Civil Procedure Code (Act X of 1877), section 401.*] A defendant may be allowed to defend a suit in *forma pauperis*, although there is no provision to that effect in the Code of Civil Procedure. *DOORGA CHURN DASS v. NITTOKALLY DASS* 120

**Penal Code, sections 149 and 325.** See CRIMINAL PROCEDURE CODE, SECTION 457 ... 349

**Pension.** See CIVIL PROCEDURE CODE (ACT X OF 1877), SECTION 266 ... 19

**Permanent Residence.** See JURISDICTION 417

**Personal Injury, Jurisdiction of Small Cause Court as to.** See ACT XI OF 1865, SECTION 6 ... 487

**Petition to sue in forma pauperis, whether it may be turned into plaint after rejection.** See PRACTICE ... 223

**Plaint, Necessary allegation in.** See CHARITABLE OR RELIGIOUS TRUSTS UNDER A WILL, SUIT TO ENFORCE ... 58

**Possession, Orders for, under Criminal Procedure Code.** See LIMITATION ACT, IX OF 1871, SCH. II, ART. 46 ... 93

**Pottah of property mortgaged to grantor—***Confirmatory grant.*] In 1846, A granted a pottah of a certain village, which had been mortgaged to him, to his illegitimate son B, promising, in the event of the mortgagor redeeming the estate, to make over to B in lieu of the village granted other villages yielding an equal revenue, and in 1847 confirmed the grant, making it rent-free. On A's death the grant made by him was confirmed by his legitimate son, the appellant, in certain pottahs, in which, however, no reference was made to the provision in the earlier grant by the father for the substitution, in the event of the mortgagor redeeming, of villages yielding an equal revenue. After the passing of Act XIII of 1866, the mortgagor obtained a decree for redemption and ousted B. *Held*, that the appellant was bound by his father's agreement in the pottah of 1846 to make over to B villages yielding a revenue equal to that of the village which had been redeemed. *BIJAI BAHADOOR SINGH vs. BHANU BUX SINGH* ... (P. C.) 21

**Practice—***Act VIII (B.C.) of 1869, section 52—Limitation—Courts, Closing of.*] In a suit

**Practise—continued.**

under section 52 of Act VIII (B.C.) of 1869, a decree was obtained for arrears of rent on the 23rd September 1878. The Court was legally closed from the 26th September to the 28th of October, and on the day it opened, the defendant deposited in Court the amount of the decree, with interest and costs, and asked to have execution stayed. *Held*, that the defendant was entitled, under the above section, to 15 clear days for making the payment, and that, under the circumstances, he was entitled to a stay of execution. **HUSBAN ALI v. DONZELLE** ... 239

**2.**—*Interest, Rate of, not specified in Decree—Execution.* Where a decree was given for a certain amount with interest, the rate not being specified, the High Court considered itself bound by the authorities to affirm an order made by the Court executing the decree, allowing the Court rate usual at the time of the making of the decree. **MADHUB LAL KHAN v. NOYAN GHOSH** ... 231

**3.**—*Petition to sue in formâ pauperis—Court Fee Stamps, Payment of, in order to turn petition into plaint—Petition to sue in formâ pauperis, whether it may be turned into a plaint after rejection.* The petitioners, on the 5th October 1877, applied to the Subordinate Judge for leave to sue in *formâ pauperis*, but their application was dismissed on the ground of limitation, the question of pauperism not having been enquired into. The order dismissing the petition was subsequently, on an application under section 16 of the Charter, set aside by the High Court, which directed the Subordinate Judge to make an enquiry as to whether the petitioners were entitled to sue in *formâ pauperis*. The Subordinate Judge made the enquiry, and, on the 17th June 1879, stated that he rejected the application to sue in *formâ pauperis*, but that he would give a written judgment. This he did on the 29th June, but meanwhile, on the 22nd June, the petitioners offered to pay the Court Fee Stamps if time were allowed, in order that their petition might be turned into a plaint, but their offer was refused on the ground that further proceedings must be by fresh suit. *Held*, that assuming that the petition of 5th May 1877, which had never been accepted, could be considered as a subsisting proceeding which might, on the authority of *Skinner's case*, 4 O. L. R., 331, (S.C.) L. R. 6 I. A., 126, be treated as a plaint filed on the 5th June 1877, it was imperative on the petitioners to have not only offered, but to have been ready to pay the Court Fee Stamps. **RAM SAHAI SINGH v. MANIRAM** 223

—See COMMISSION, EVIDENCE TAKEN ON 109

—See INSOLVENCY ... 382

**Prescription.** See CHUR LANDS ... 249

**Presidency Magistrate's Act (IV of 1877), section 129—Prosecution of Criminal Case.**

**Presidency Magistrate's Act—continued.**

*Right to conduct.* No person, whether Counsel or Attorney, can claim the right to conduct the prosecution of any criminal case, under the Presidency Magistrate's Act, without the sanction of the Presidency Magistrate. **EMPREES v. BUTTO KRISTO DASS** ... 374

**Presumption of Accuracy of Map.** See EVIDENCE ACT (I OF 1872), SECTION 83 519

**Previous convictions, Evidence of for what purpose.** See MIS-DIRECTION ... 219

**Principal and Surety—Surety, Discharge of—Contract Act (IX of 1872)—section 135—Interest, Acceptance of, in advance. Although as a general rule the acceptance of interest in advance by the creditor does operate as a giving of time to the principal debtor, and consequently as a discharge of the surety, yet where the surety knows of and consents to the advance interest being taken, he will not be discharged from liability. Judgment of the High Court, reported in 2 Cal. L. R., 455—**PROTAP CHUNDER DASS v. GOUR CHUNDER ROY**—affirmed. **GOUR CHUNDER ROY v. PROTAP CHUNDER DASS (P.O.)** 591**

**Priority attaching Creditors.** See ATTACHMENT ... 85

**Priority.** See APPORTIONMENT OF DEBTS DUE ON MORTGAGES OF DIFFERENT SHARES OF SAME PROPERTY ... 322

—See REGULATION VIII OF 1819, SECTIONS 13 AND 17 ... 28

**Privy Council Rulings—Hindu Law—Re-cital—Admission—Widow, Enlargement of estate of—Limitation Act, IX of 1871, Sch. II, Art. 129—Adoption. D, a Hindu, being old and unable to manage the business of his estate which he held jointly with his brother, executed a deed whereby he agreed to pay a manager to take the business off his hands. In that deed he described his wife, who was a *purda nashin* lady, as being joined with him as owner of the estate. *Held*, that there was no admission binding upon those claiming under D, and that the widow's estate was not enlarged to an absolute estate. The provision in Act IX of 1871, Sch. II, whereby it is enacted that, with respect to suits to establish or set aside an adoption, the time when the period of limitation begins to run is "the date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father," does not interfere with the right, which but for it a plaintiff has of bringing a suit to recover possession of real property within twelve years from the time when the right accrued. **RAJ BAHADOOR SINGH v. ACHUMBIT LALL** ... 12**

**2.**—*Pottah of property mortgaged to grantor—Confirmatory grant.* In 1846, A granted a pottah of a certain village which had been mortgaged to him, to his illegitimate son B, promising, in the event of the

**Privy Council Rulings—continued.**

**mortgagor** redeeming the estate, to make over to B in lieu of the village granted other villages yielding an equal revenue, and in 1847 confirmed the grant, making it rent-free. On A's death the grant made by him was confirmed by his legitimate son, the appellant, in certain pottahs, in which, however, no reference was made to the provision in the earlier grant by the father for the substitution, in the event of the mortgagor redeeming, of villages yielding an equal revenue. After the passing of Act XIII of 1860, the mortgagor obtained a decree for redemption, and *quoted B.* *Held*, that the appellant was bound by his father's agreement, in the pottah of 1840, to make over to B villages yielding a revenue equal to that of the village which had been redeemed. **BIRAI BAHADOOR SINGH v. BIRAN BUX SINGH** ... .. 21

**3** ————— **Limitation Act**  
(IX of 1871), *Sch. II, Art. 145—Adverse possession—Judgment—Appeal.* In 1839 a putwara was made of an estate which, up to that time, had been held jointly in the following shares:—the plaintiff 10 annas, his father 2 annas, and his brother the remaining 4 annas, and under the putwara different villages were distributed, each party taking certain specified villages as his share. In 1844 the father died, his share having in the meantime, in some way, become vested in the plaintiff. In 1856 execution was issued against the 4 annas share of the plaintiff's brother, who resisted the execution, and in 1858 a suit was instituted by the judgment-creditor to enforce his rights, the present plaintiff being joined a defendant with his brother. In this suit it was decided, in 1860, that the putwara was not binding on the judgment-creditor, and that he was at liberty to take a 4 annas share of the rents of all the villages divided under the putwara, and in 1868 this judgment was, on appeal by the brother, affirmed. The decree was not executed till July 1864. In 1873 the plaintiff filed the present suit to establish his right to receive his 12 annas share. *Held*, that there was no adverse possession against the plaintiff until the appeal in the other suit was dismissed in 1868, and therefore that the suit was not barred. *Per Curiam.*—It cannot be said that the plaintiff was bound to assert his right in 1860, because S. (the brother) having appealed against the decree, there was a possibility of its being reversed or altered. [Judgment of the High Court reversed.] **MANWAR AIT v. UNODA PERSHAD ROY** ... .. 71

**4** ————— **Hindu Law—**  
**Compromise of Suit by widow—Adoption—Evidence.** In a suit in which a claim was made in virtue of an alleged adoption, to the estate of a deceased Hindu, the widow made a compromise, which was not in writing, with the claimant, wherein the adoption was admitted, but alleged to have been on condition that

**Privy Council Rulings—continued.**

the widow should enjoy the entire property for her life without power of alienation, and that, after her death, her minor daughters should take the self-acquired property, and that the claimant should succeed to the ancestral estate. *Held*, that the daughters could not under any circumstances, be bound by the compromise. The evidence to establish such a conditional adoption as that alleged, must, as in the case of a nuptial will, be very strong. Judgment of the High Court reversed on the facts. **IMRIT KOTWUN v. ROOP NARAIN SINGH** ... .. 76

**5** ————— **Agent, Termination of authority of—Notice—Acknowledgment—Limitation—Secondary Evidence.** H., who had acted as agent for the defendant in certain money transactions with the plaintiff, having left the defendant's service subsequently, signed a statement of account with the plaintiff in respect of such transactions. The plaintiff was aware that H. had quitted the defendant's service, though no formal notice was given of the fact. In a suit by the plaintiff upon the account, it was held, reversing the decision of the High Court, that he must be taken to have known that H. had no general authority to sign the statement of account on behalf of the defendant, and that the acknowledgment signed by him could not prevent the operation of the Statute of Limitations. When an important document is not produced, and no explanation is given of its non-production, an inference not unnaturally arises either that the letter, if written, does not contain that which it represented to contain, or that no such letter ever existed. **DINOMOXI DEBI CHOWDHARI v. LUCHMIPUT SINGH BAHADUR** ... .. 102

**6** ————— **See Judicature—**  
**Order of remand.** In 1814 litigation commenced between a zemindar and his tenants by reason of his having dispossessed them of lands held under a *jote* tenure, and decree having been obtained by the tenants the zemindar assessed the *jote* lands at a rent. Subsequently this rent fell into arrear, and under a decree the *jote* lands were in 1836 sold in satisfaction of the arrears to J, who was put in possession in 1838. Another suit, which was pending between the tenants and their mortgagee, in which a question arose whether these *jote* lands were included in the mortgage, was decided in favour of the mortgagee in 1841. J, the then *jote* tenant, was no party to that suit, and continued in possession of his *jote* lands. Disputes arose, and by an order of the Sadder Court in 1845, the *jote* lands were directed to be put in possession of the mortgagee. In 1856 a suit was brought by J's representative to set aside that order and to recover possession of the *jote* lands. The Privy Council held that, as J, the *jote* tenant, was not a party to the suit under which the decree was made in 1841, the decree was not binding upon

**Privy Council Rulings—continued.**  
him, or those deriving title through him, and remanded, the case in order that the issue, whether the land was parcel of the *jote* or not, might be tried. *Held*, that this order of remand was conclusive, that the question of the title of the representatives of J. to the *jote* lands could not be re-opened. [Judgment of the High Court affirmed.] **JUGGODUMBA DASSEE v. TARAKANT BANERJEE** ... .. 121

7. ————— *Birt tenures—Act XVI of 1865—Act XIII of 1866—Birteah, Suit by—Limitation.* A suit by a Birteah in respect of his tenure is cognisable under Act XVI of 1865, and Act XIII of 1866, notwithstanding that he may not have been in possession in 1855. [Judgment of the Judicial Commissioner of Oudh affirmed.] **DREE BIZAI SINGH v. GOPAUL DUTT PANDAY** ... .. 146

8. ————— *Hindu Law—Impartible Raj, Resumption and Regrant of, by Government—Divisibility—Sunnud, Construction of—"Heirs."* In 1783, an impartible raj was confiscated by the Government on account of the rebellion of the then semindar. In the following year it was restored to the eldest son of the former semindar as it existed prior to the confiscation. In 1798, the estate was again resumed by the Government for arrears of revenue, and in 1802 two new semindaries were carved out of it, one of which was granted to the second son of the semindar, who was deprived of possession in 1783, at a fixed revenue. The sunnud, by which the grant was created, contained, *inter alia*, the following clauses:—"You shall be at free liberty to transfer, without the previous consent of Government or any other authority, to whomsoever you may think proper, either by gift, sale, or otherwise your proprietary right in the whole or in any part of your zemindary \* \* \*

\* \* \* Continuing to perform the above stipulations, and to perform the duties of allegiance to Government, you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns, at the permanent assessment herein named." *Held* (reversing the decision of the High Court), that the word "heirs," in the sunnud must be construed to mean the heirs of the grantee, according to the ordinary rules of inheritance of the Hindu Law, and not a single heir, according to the rule of primogeniture which formerly obtained in the zemindary. **BABOO BHEE PERTAB SAHEB v. MOHARAJAH RAJENDER PERTAB SAHEB, 12 Moore's L. A., 1 distinguished. VENKATA NARASIMHA APPA ROW v. NARAYYA APPA ROW** ... .. 153

9. ————— *Limitation Act XIV of 1859, section 1, sub-section 13—Maintenance.* A testator, who died in 1855, bequeathed all his property to his eldest son by his will, which contained the following provision:—"He (the eldest son) shall provide for both

**Privy Council Rulings—continued.**  
mothers, treating them with great respect, and he shall regard each of his two younger brothers as a son, providing for them, and my own servants in a manner befitting their several conditions in life." In 1871 one of his widows brought an action for maintenance and arrears of maintenance. *Held*, that the maintenance was not made a charge upon the estate, and that consequently the suit was not barred under Act XIV of 1859, section 1, sub-section 13. By common law the right to maintenance is a right accruing from time to time according to the wants and exigencies of the person entitled to claim it. **NARAYANRAO RAM CHANDRA PANT v. RAMARAI** ... .. 162

10. ————— *Hindu Law—Adoption—Sudra adoption—Ceremonies.* Among Sudras in Bengal no ceremonies in addition to the giving and taking of the child are necessary to constitute a valid adoption. [Judgment of the High Court affirmed.] **INDROMONI CHOWDHURANI v. BEHARI LALL MULLICK** ... .. 183

11. ————— *Causes of Action—Religious Services, Right to perform—Act VIII of 1859, section 32.* A suit will lie to recover a specific pecuniary benefit to which the plaintiff's declare themselves entitled on condition of performing certain religious services, and if to determine the right to such pecuniary benefit it becomes necessary to determine incidentally the right to perform the religious services, the Court has jurisdiction to consider and decide the point. [Judgment of the High Court of Madras reversed.] **TIRU KRISHNAMA CHURIAN v. KRISHNA SWAMI TATA CHURIAN** 201.

12. ————— *Chur lands—Prescription.* Independently of the title of Government to lands which have been originally formed as an island in the bed of a river, possession for three years under an order of a Magistrate in a proceeding under Act IV of 1840 does not create a title by prescription. [Judgment of High Court affirmed.] **WISE v. COLLECTOR OF BACKERGUNGHEE** ... .. 249

13. ————— *Mortgage—Account, Contract by mortgagee to be relieved from obligation to—Regulation XXXIV of 1803, sections 9 and 10.* In a mortgage executed in 1852 while Regulation XXXIV of 1803 was in force, the mortgagor contracted that he should not have any right or claim to an account of moneys profits during the time of the mortgagee's possession. *Held*, that the contract was binding, notwithstanding the provisions of sections 9 and 10 of that Regulation imposing an obligation on the mortgagee to account. **BUDEI PARSAD v. MURLIDHUR** ... .. 257

14. ————— *Hindu Law—Widow's Estate, Forfeiture of—Unchastity during widowhood.* Under Hindu Law, as administered

- Privy Council Rulings—continued.**  
in the Bengal School, a widow, who has once inherited the estate of her husband, is not liable to forfeit that estate by reason of her subsequent unchastity. [Judgment of the High Court affirmed.] **MONIRAM KOLITA vs. KERRY KOLITANI** ... 322
- 15. ———— Execution Sale of right and title under zuripeshgi lease—Mesne profits under decree upon zuripeshgi lease.]** A decree for possession and mesne profits having been obtained upon a zuripeshgi mortgage of a certain mouzah executed in favour of M and K, the mortgagor prior to any proceedings taken to execute the decree, obtained a judgment against M and K, and in execution of such judgment attached and sold their "rights and title under the original deed of zuripeshgi lease." The representative of M and K subsequently applied for execution of their decree so far as it related to the recovery of mesne profits. *Held*, that inasmuch as the decree had not been attached and sold, and the mesne profits depended wholly upon it, the applicant was entitled to execute the decree for the mesne profits due thereunder. The existing rights of the judgment-debtor under the zuripeshgi only were sold. [Judgment of High Court reversed] **GONESH LAL TEWARI v. SHAM NARAIN** ... 533
- 16. ———— Limitation—Proceeding to enforce decree—Jurisdiction—Bond fidee.]** A proceeding for the purpose of obtaining execution of a decree taken *bond fide* and with due diligence before a judge whom the party instituting the proceeding *bond fide* believes, though erroneously, to have jurisdiction, especially when the Judge himself also supposes that he has jurisdiction, and deals with the case accordingly, is a proceeding to enforce the decree within the meaning of section 20 of Act XIV of 1859. Compare Act XV of 1877. **ROY DHUMPUT SINGH v. MUDHOMOTTER DEBIA, 11 B. L. R., (P. C.) 23. HIRA LALL v. BUDRI DASS** ... 561
- Probate—Mahomedan Will—District Court.]** A district Court has no jurisdiction to admit the will of a Mahomedan to probate. **FATIMUN-NISSA BEGUM v. MIR HAMZA ALI** ... 391
- of Wills of Hindus, executed prior to September 1870. See **HINDU WILLS ACT (XXI OF 1870), SECTION 2** ... 132
- , Revocation of—*Succession Act (X of 1865), section 234.* Where probate of a will of a deceased Mohunt, under which he appointed the executor his successor, was granted to such executor, it was *held*, that the fact of the executor having subsequently been excluded from the community of Mohunts on account of his misconduct was not a just cause for the revocation of the probate within the meaning of section 234 of the Succession Act. **MOHUN DASS v. LUCHMUN DASS GOSSAMI** ... 265
- Probate.** See **WILL** ... 176
- Proceeding to enforce Decree.** See **LIMITATION** ... 561
- Procedure.** See **LIMITATION ACT, XV OF 1877, SECTION 4** ... 267
- See **ORIGINAL PROCEDURE CODE, ACT X OF 1872, SECTION 64** ... 279
- , See **RENT, APPORTIONMENT OF, BY PURCHASER FROM ONE OF SEVERAL CO-SHARERS** ... 421
- , See **SMALL CAUSE COURT ACT, XI OF 1865, SECTION 21** ... 549
- in trials of members of opposing factions in riots. See **CRIMINAL PROCEDURE CODE, ACT X OF 1872, SECTIONS 250 AND 265** ... 521
- , See **WILL, PROBATE OF** ... 176
- Proclamation.** See **EXECUTION OF DECREE AGAINST ONE JUDGMENT-DEBTOR PENDING APPEAL BY ANOTHER** ... 237
- Prosecution of Criminal case, Right to conduct.** See **PRESIDENCY MAGISTRATE'S ACT, SECTION 129** ... 374
- Public Road—User of Road by Public.]** In order to establish that a road is a public road, it is sufficient if acts of user by the public are shown to have been acquiesced in by the owner of the land over which the road passes, and that those acts are of such a character as to warrant the inference that the owner, intended to make over to the public the right to use the land as a public highway. **J. ANDERSON v. JUGGUMBA DABI** ... 282
- Purchase-money, Repayment of.** See **ALIMATION BY HINDU WIDOW, SUIT TO SET ASIDE** ... 146
- Receiver, Appointment of.** See **CIVIL PROCEDURE CODE (ACT X OF 1877), SECTIONS 504 AND 505** ... 467
- Reciprocal Demands.** See **LIMITATION ACT, IX OF 1871, SCHED. II, ART. 87** ... 110
- Recital.** See **HINDU LAW** ... 12
- "Reflexion of a Son."** See **HINDU LAW** 393
- Reference, Recall of.** See **ARBITRATION** 1
- Reference to High Court.** See **CRIMINAL PROCEDURE CODE (ACT X OF 1872), SECTIONS 295, 296** ... 345
- Reference under Regulation III of 1872.** See **SORTAL REGULATION, III OF 1872, SECTION 5, 555**
- Registration Act (III of 1877), sections 17 (H) and 23—Agreement to execute conveyance, Registration of, when treated as the conveyance—Limitation.]** The defendant entered into a written agreement to execute a conveyance of certain land to

**Registration Act—continued.**

the plaintiff within 30 days from the date of such agreement, it being provided that, in default of the conveyance being executed, the agreement itself should be treated as the conveyance.

Default was made, and more than four months after the date of the execution of the agreement, the plaintiff applied to have it registered.

*Held*, that no conduct of the parties, however, much it might alter the character of the document, could affect the limitation laid down by section 23 of the Registration Act, and that the agreement to execute the conveyance having become a conveyance, could not under that section be accepted for registration. **NOBAN NASYA v. DHON MAHOMED SIRCAR** ... 186

**Registrar, Admission of Execution of will before.** See SUCCESSION ACT (X OF 1865), SECTION 50 ... 303

**Regulation XXXIV of 1803, sections 9 and 10.** See MORTGAGE ... 257

— **VIII of 1819, sections 13 & 17**—*Mortgage, Interest of—Charge—Priority—Voluntary payment.*] In order to prevent the sale of a taluq under Regulation VIII of 1819, the plaintiff, to whom the taluq had been mortgaged under a bond which provided that the amount advanced thereunder should be a charge on the proceeds in the event of a sale, paid the amount of the arrears due, *Held*, that the plaintiff as mortgagee had a sufficient interest to protect, that the payment was not a voluntary payment, and that the amount of such payment was a valid charge on the property. **MOHESH CHUNDER BANERJEA v. RAM POSUNNO CHOWDERY** ... 28

— **VII of 1822, section 14**—*Enhancement of Jumma, of lands situate in town—Collector, Jumma fixed by, to be final—Ejectment.*] Where the Collector has issued due notice of enhancement, under section 14 of Regulation VII of 1822, of the jumma of lands situate in town and subject to that Regulation, and, on failure by the tenant to accept a settlement at the revised rate, an action in ejectment has been brought, the Civil Court has no power to consider whether the new rate of assessment is reasonable, or in any way to interfere with the amount of the revised jumma as fixed by the Collector. Where the tenant refuses to accept a revised settlement under such circumstances, he is to be entitled to a reasonable time within which to remove a house standing upon the lands in question. **RAM CHUND BERA v. THE GOVERNMENT** ... 365

— **VII of 1822, Records made under.** See EVIDENCE ACT, I OF 1872, SECTIONS 35, 48 AND 49 ... 593

— **XI of 1825, section 4, clause (1).** See ENHANCEMENT OF RENT ... 362

**Regulation III of 1872, section 5.** See SONTAL REGULATION, III OF 1872, SECTION 5 ... 555

— **XX of 1873, sections 8, 9, and 10.** See ACT VIII (B.O.) OF 1869, SECTION 28 ... 301

**Release of one of several judgment-debtors jointly liable for amount decreed.** See CONTRACT ACT (IX OF 1872), SECTION 44 ... 213

**Religious Services, Right to perform.** See CAUSE OF ACTION ... 201

**Remedy for Debt, whether barred.** See LIMITATION ... 489

**Rent, Apportionment of, by purchase from one of several joint owners—Co-sharers, Effect of sale by one of several—Procedure—Parties—Severance of tenure.**] A sale of a share of a tenure which has been let to a tenant in its entirety does not of itself effect a severance of the tenure or an apportionment of the rent, and in the absence of any such severance or apportionment, the tenant is justified in paying the entire rent as before to all the parties jointly entitled to it. If the purchaser, whether the sale be a private one or in execution of a decree, desires to effect a severance of the tenure and an apportionment of the rent, he must give the tenant due notice; and, if an amicable apportionment of the rent cannot be made by arrangement between all the parties concerned, he may bring a suit against the tenant for the purpose of having the rent apportioned, making all the other co-sharers parties to the suit. **SHREENATH CHUNDER OHOWDHEY v. MOHESH CHUNDER BANERJEA**, 1 C.L.J., 453, considered and approved. **ISSUE CHUNDER DUT v. RAM KRISTO DUT** ... (F.B.) 421

**Rent, Suit by one of several Co-sharers.** See CO-SHARERS ... 16

— **CO-SHARERS, SUIT FOR RENT BY ONE OF SEVERAL** ... 402

**Rent, Suit for under a Settlement—Issues raised—Admission by defendant—Assessment.**] In a suit for rent, based upon an alleged settlement, the plaintiff failed to prove such settlement. *Held*, that no issue having been raised as to what was the fair and proper value of the land, the plaintiff was not entitled to have that question determined. **LUTF ALI KHAN v. FIKIRA SINGH** ... 203

**Res-judicata—Civil Procedure Code (Act X of 1877), section 13, Explanation V—Easements, Claims to.**] A decree obtained by A. in a suit brought by him to establish a right to close a passage, over which an easement by prescription was claimed by the defendant in respect of his own house, is no bar, on the ground of *res judicata*, to a suit against A. by a third person



**Res-Judicata—continued.**

claiming an easement similar to that claimed by the defendant in the former suit over the same passage, and in respect of a house similarly situated. **KALI SUNKAR DOSS v. GOPAL CHUNDER DUTT** ... 543

**1. ——— Execution of former decree, Order made in.]** Certain lands having been divided under a butwara between A and B, who together took one portion, and C who took the remainder, A in 1847, mortgaged his share to B under a usufructuary mortgage. In 1851 a dispute arose as to the boundaries under the butwara, and ended in C surrendering 51½ beegahs, which B was allowed to take possession of under an ekarnamah executed by A, to secure the costs incurred by B in the dispute. In 1874 A sued to recover possession of a moiety of the lands held jointly by him with B, and in 1875 obtained a decree for possession and wasilat, no specific mention of the 51½ beegahs being made in the decree. In execution of the decree, wasilat in respect of a moiety of the 51½ beegahs was allowed, an objection by the defendant to such wasilat being charged having been overruled. In 1878, B sued to recover possession of the moiety of the 51½ beegahs, which had been taken by A under his decree. *Held*, that in rejecting the objection raised by B, and allowing wasilat in respect of the 51½ beegahs, the Court had interpreted the decree passed, and declared that under it, possession of a moiety of the 51½ beegahs had been decreed and given to A, and that the suit instituted in 1878 was therefore barred. *Held*, also, that this matter having been decided under section 11, Act XXIII of 1861, between the parties in execution of a decree could not be made the subject of a suit. **KALI MUNDUL v. KADAR NATH CHUCKERBUTTY** 215

**3. ——— Jurisdiction—Competent Jurisdiction—Estoppel—Civil Procedure Code, Act X of 1877, section 13.]** A suit having been brought in the Moonsiff's Court to establish the plaintiff's title, as cheela and heir of a late Mohunt, to certain land in respect of which that Court had jurisdiction, a subsequent suit was instituted by the plaintiff who was unsuccessful in the former suit, in the Court of the Subordinate Judge, against the same defendant to establish the same title to the entire estate of which the land, the subject-matter of the suit before the Moonsiff, formed a portion. The value of the entire estate was beyond the jurisdiction of the Moonsiff. *Held*, that the Moonsiff's Court was a Court of competent jurisdiction within the meaning of the Civil Procedure Code, Act X of 1877, section 13; and that, on the authority of **KRISHNA BEHARY ROY v. BROJESWARI CHOWDHREANER**, L. R., 2 L. A., 283, the suit before the Subordinate Judge could not be maintained. *Per* MACLEAN, J.—The decision of the Moonsiff as to the title of portion of the land claimed is conclusive as between the parties as to every

**Res-Judicata—continued.**

portion of land held under the same title. **NUND KISHORE v. HURRER PERSHAD MISHRA**, 13 W. R., 64. **TURONIDHI DEBI GHOSE v. SHYAMPUTI SABANI** ...

**4. ——— Order of Remand.]** In litigation commenced between a zemindar and tenants by reason of his having dispossessed of lands held under a *jote* tenure, and having been obtained by the tenants, the zemindar assessed the *jote* lands at a rent. Subsequently this rent fell into arrear, and the *jote* lands were, in 1836, sold in satisfaction of the arrears to J, who was put in possession in 1839. Another suit, which was brought between the tenants and their mortgagee, which raised the question whether the *jote* lands were included in the mortgage, was decided in favour of the mortgagee in 1841. J, the *jote* tenant, was no party to that suit, and remained in possession of his *jote* lands. In 1845, a suit was brought by J's representative to set aside the mortgage, and to recover possession of the *jote* lands. The Privy Council held that, as J, the *jote* tenant, was not a party to the suit under which the decree was made in 1841, the decree was not binding upon him or those deriving title from him, and remanded the case, in order to issue, whether the land was parcel of the mortgage, might be tried. *Held*, that this remand was conclusive, that the question of title of the representatives of J to the *jote* lands could not be reopened. [Judgment of the Court affirmed.] **JUGGODUMBA DOSSEE v. RAKANT BANERJEE** ... (P)

— See **CIVIL PROCEDURE CODE OF 1865, SECTION 13, EXPL. V**

**Residence, Permanent.** See **JURISDICTION**

**Reversionary Heirs, Suit by, to set aside a decree committing was**  
**DECLARATORY DECREE** ...

**Review.** See **SMALL CAUSE COURT ACT OF 1865, SECTION 21** ...

— **Final order on review as to Appeal—Civil Procedure Code (Act X of 1877, section 206.)** On the 28th July 1878, a judgment was pronounced by the Subordinate Judge in favour of the plaintiff, except as to part of the claim. Subsequently on the 3rd February 1879, the defendant applied, by petition, for a judgment on a number of grounds, and, on the ground that he was entitled to a proportion to the amount of the claim, the plaintiff which had been disallowed, the Subordinate Judge disallowed all the grounds upon which it was sought, save that as to costs, upon which he passed the following order:—“The in-

**Review—continued.**

to proportionate costs seems to be valid. It was a clerical mistake. . . . No reason was given for disallowing the costs. I allow 'his ground.' *Held*, that the order must be treated as a final order in the suit, and not as an order rejecting an application for review, but allowing the amendment of a clerical error, which might have been rectified under section 206 of the Code of Civil Procedure without granting the review. *JOYKESSEN MOOKERJEE v. ATAWUR RAHMAN* ... 575

**Revision of Decree of Small Cause Court.**  
See SMALL CAUSE COURT ... 91

**Revival of Suit. Application for.** See LIMITATION ACT, XV OF 1877, SECTION 11, ART. 178 ... 345

**Riot, Trial of Members of opposing factions for.** See CRIMINAL PROCEDURE CODE, (ACT X OF 1872), SECTIONS 260 AND 265 521

**"Saleable Property."** See CIVIL PROCEDURE CODE (ACT X OF 1877), SECTION 266 ... 19

**Sapinda, Definition of.** See MITAKSHARA 500

**Secondary Evidence.** See AGENT, TERMINATION OF AUTHORITY OF ... 101

**Security for good Behaviour.** See CRIMINAL PROCEDURE CODE (ACT X OF 1872), SECTIONS 506 AND 510 ... 128

**Sentence on appeal from acquittal Commencement of.** See CRIMINAL PROCEDURE CODE, SECTION 457 ... 349

**Set-off—Insolvent Act (Stat. 11 and 12 Vict., cap. 21), section 39—Mutual credit—Civil Procedure Code, Act X of 1877, section 111.]** Where there is a debt due from an insolvent prior to his insolvency to another from whom there was a debt which was in dispute due to the insolvent, in a suit brought by the Official Assignee to recover the latter debt, the defendant is entitled under section 39 of the Insolvent Act, 11 and 12 Vict., cap. 21, to set off the debt due from him to the insolvent against sums which may be claimed from him. *A. B. MILLER v. A. BEER* ... 294

**Settlement cases.** See SONTHAL REGULATION III OF 1872, SECTION 5 ... 555

**Severance of Tenure.** See RENT, APPORTIONMENT OF, BY PURCHASER FROM ONE OF SEVERAL CO-SHARERS ... 421

**Small Cause Court Act, XI of 1865, section 21—New trial—Review—Civil Procedure Code, Act X of 1877, sections 623 and 624—Procedure.]** A Judge of a Court of Small Causes has jurisdiction in a case, decided by his predecessor, to entertain an application for a new trial made under section 21 of Act XI of 1865, although the applicant does not seek for the rectification of any clerical error, nor base his case upon the discovery of any new and important matter or evi-

**Small Cause Court Act—continued.**

dence. *Per GARTH, C.J.*—In dealing with applications for a new trial, under section 21 of Act XI of 1865, a Small Cause Court Judge is bound to observe and respect the manifest intention of section 624 of Act X of 1877. See *ISHAN CHANDRA BANERJEE v. LOCHUN GOPH, O. L. R., 559.* *SHUMSHER ALI v. KOORKUT SHAH* ... 549

**Small Cause Court—Revision of decree of Small Cause Court.]** A suit having been brought in a Small Cause Court for damages laid at Rs. 400 for wrongful dismissal, a decree was given for Rs. 75 per mensem, the amount of wages which had been agreed on, up to the filing of the plaint, the Judge intimating that for damages accruing after the filing of the plaint further suits month by month might be brought. Two suits were accordingly brought for the two months next succeeding the date of the first suit, and decrees were obtained. The High Court, upon an application made by the defendant, set aside these decrees, on the ground that after the first suit no further suits would lie. *SIMPSON v. CLEGHORN* ... 91

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**Statements by Deceased as to cause of Death.** See EVIDENCE ACT (I OF 1872), SECTION 32 ... 278

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claiming an easement similar to that claimed by the defendant in the former suit over the same passage, and in respect of a house similarly situated. *KALI SUNKAR DOSS v. GOPAUL CHUN-  
KER DUTT* ... .. 543

**1. ——— Execution of former decrees, order made in.]** Certain lands having been divided under a butwara between A and B, who together took one portion, and C who took the remainder, A in 1847, mortgaged his share to B under a usufructuary mortgage. In 1851 a dispute arose as to the boundaries under the butwara, and ended in C surrendering 51½ beegahs, which B was allowed to take possession of under an ekranamah executed by A, to secure the costs incurred by B in the dispute. In 1874 C sued to recover possession of a moiety of the lands held jointly by him with B, and in 1875 obtained a decree for possession and wasilat, no specific mention of the 51½ beegahs being made in the decree. In execution of the decree, wasilat in respect of a moiety of the 51½ beegahs was allowed, an objection by the defendant to such wasilat being charged having been overruled. In 1878, B sued to recover possession of the moiety of the 51½ beegahs, which had been taken by A under his decree. *Held*, that in rejecting the objection raised by B, and allowing wasilat in respect of the 51½ beegahs, the Court had interpreted the decree passed, and declared that under it, possession of a moiety of the 51½ beegahs had been decreed and given to A, and that the suit instituted in 1878 was therefore barred. *Held*, also, that this matter having been decided under section 11, Act XXIII of 1861, between the parties in execution of a decree could not be made the subject of a suit. *KALI MUNDUL v. KADAR NATH CHUCKERBUTTY* 215

**2. ——— Jurisdiction—Competent Jurisdiction—Estoppel—Civil Procedure Code, Act X of 1877, section 13.]** A suit having been brought in the Moonsiff's Court to establish the plaintiff's title, as chela and heir of a late Mohunt, to certain land in respect of which that Court had jurisdiction, a subsequent suit was instituted by the plaintiff who was unsuccessful in the former suit, in the Court of the Subordinate Judge, against the same defendant to establish the same title to the entire estate of which the land, the subject-matter of the suit before the Moonsiff, formed a portion. The value of the entire estate was beyond the jurisdiction of the Moonsiff. *Held*, that the Moonsiff's Court was a Court of competent jurisdiction within the meaning of the Civil Procedure Code, Act X of 1877, section 13; and that, on the authority of *KRISHNA BEHARY ROY v. BROJESWARI CHOWDHREANEE*, L. R., 2 L. A., 283, the suit before the Subordinate Judge could not be maintained. *Per MACLEAN, J.*—The decision of the Moonsiff as to the title of portion of the land claimed is conclusive as between the parties as to every

**Res-Judicata—continued.**

portion of land held under the same title. See *NUND KISHORE v. HURRIS PERSHAD MUNDUL*, 13 W. R., 64. *TUPONIDHI DEBI GIB GOSWAMI v. SHIPUTI SARANI* ... .. 305

**3. ——— Order of Remand.]** In 1814, litigation commenced between a zemindar and his tenants by reason of his having dispossessed them of lands held under a *jote* tenure, and decrees having been obtained by the tenants, the zemindar assessed the *jote* lands at a rent. Subsequently this rent fell into arrear, and under a decree the *jote* lands were, in 1836, sold in satisfaction of the arrears to J, who was put in possession in 1839. Another suit, which was pending between the tenants and their mortgagees, in which a question arose whether these *jote* lands were included in the mortgage, was decided in favour of the mortgagees in 1841. J, the then *jote* tenant, was no party to that suit, and continued in possession of his *jote* lands. Disputes arose, and by an order of the Sudder Court in 1845, the *jote* lands were directed to be put in possession of the mortgagees. In 1866 a suit was brought by J's representative to set aside that order, and to recover possession of the *jote* lands. The Privy Council held that, as J, the *jote* tenant, was not a party to the suit under which the decree was made in 1841, the decree was not binding upon him or those deriving title through him, and remanded the case, in order that the issue, whether the land was parcel of the *jote* or not, might be tried. *Held*, that this order of remand was conclusive, that the question of the title of the representatives of J to the *jote* lands could not be reopened. [Judgment of the High Court affirmed.] *JUGGODUMBA DOSSER v. TABAKANT BANERJEE* ... .. (P.O.) 121

— See CIVIL PROCEDURE CODE (ACT X OF 1877), SECTION 13, EXPL. V ... 516

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**Review.** See SMALL CAUSE COURT ACT, XI OF 1865, SECTION 21 ... .. 549

— **Final order on review as to costs.** *Appeal—Civil Procedure Code (Act X of 1877) section 206.]* On the 28th July 1878, a decree was pronounced by the Subordinate Judge in favour of the plaintiff, except as to portion of his claim. Subsequently on the 3rd February 1879, the defendant applied, by petition, for a review of judgment on a number of grounds, and, *inter alia*, on the ground that he was entitled to costs, in proportion to the amount of the claim of the plaintiff which had been disallowed. The Court disallowed all the grounds upon which the review was sought, save that as to costs, upon which it passed the following order:—"The last ground

**Review—continued.**

to proportionate costs seems to be valid. It is a clerical mistake. \* \* \* No reason was given for disallowing the costs. I allow 'his round.' *Held*, that the order must be treated as a final order in the suit, and not as an order ejecting an application for review, but allowing the amendment of a clerical error, which might have been rectified under section 206 of the Code of Civil Procedure without granting the review. *OYKESSEN MOOKERJEE v. ATAWUR RAHMAN* ... 576

**Revision of Decree of Small Cause Court.** See SMALL CAUSE COURT ... 91**Revival of Suit. Application for.** See LIMITATION ACT, XV OF 1877, SECTION 111, ART. 178 ... 345**Right, Trial of Members of opposing factions for.** See CRIMINAL PROCEDURE CODE, (ACT X OF 1872), SECTIONS 280 AND 285 ... 521**Saleable Property.** See CIVIL PROCEDURE CODE (ACT X OF 1877), SECTION 266 ... 19**Sapinda, Definition of.** See MITAKSHARA 500**Secondary Evidence.** See AGENT, TERMINATION OF AUTHORITY OF ... 101**Security for good Behaviour.** See CRIMINAL PROCEDURE CODE (ACT X OF 1872), SECTIONS 505 AND 510 ... 128**Sentence on appeal from acquittal. Commencement of.** See CRIMINAL PROCEDURE CODE, SECTION 457 ... 349

**Set-off—Insolvent Act (Stat. 31 and 12 Vict., cap. 21), section 39—Mutual credit—Civil Procedure Code, Act X of 1877, section 111.]** Where there is a debt due from an insolvent prior to his insolvency to another from whom there was a debt which was in dispute due to the insolvent, a suit brought by the Official Assignee to recover the latter debt, the defendant is entitled under section 39 of the Insolvent Act, 11 and 12 Vict., cap. 21, to set off the debt due from him to the insolvent against sums which may be claimed from him. *A. B. MILLER v. A. BERN* ... 294

**Settlement cases.** See SONTHAL REGULATION III OF 1872, SECTION 5 ... 555**Severance of Tenure.** See RENT, APPORTIONMENT OF, BY PURCHASER FROM ONE OF SEVERAL CO-SHARERS ... 421

**Small Cause Court Act, XI of 1865, section 21—New trial—Review—Civil Procedure Code, Act X of 1877, sections 623 and 624—Procedure.]** A Judge of a Court of Small Causes has jurisdiction in a case, decided by his predecessor, to entertain an application for a new trial made under section 21 of Act XI of 1865, although the applicant does not seek for the rectification of any clerical error, nor base his case upon the discovery of any new and important matter or evi-

**Small Cause Court Act—continued.**

dence. *Per GARTH, C.J.*—In dealing with applications for a new trial, under section 21 of Act XI of 1865, a Small Cause Court Judge is bound to observe and respect the manifest intention of section 624 of Act X of 1877. See *ISHAN CHANDRA BANERJEE v. LOCHUN GOPE*, C. L. R., 559. *SHUMSHER ALI v. KOORKUT SHAH* ... 549

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- tatute 11 and 12 Vic., Cap. 21, section 9.** See **INSOLVENCY**... 382
- See **SET-OFF** ... 294
- Succession Act (X of 1865) section 50—At-  
estation of Wills—Registrar, Admission of Exe-  
cution of Will before.]** Where a testator admits  
execution of a Will before the Registrar, if the  
attestors attesting that admission sign their  
names in the presence of the testator, their attes-  
tation will be a sufficient compliance with the  
requirements of section 50 of the Succession Act,  
and will remedy any defects in the original  
testation of the Will. **HURO SUNDARI DABIA  
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- See **EXECUTION BY IMPLICATION** ... 228
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- Tenures transferable by custom of  
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transferable.]** The mere fact that a tenure is  
transferable under the custom of the district  
does not make it one which is not terminable  
by the landlord on sufficient notice. **SHAMA  
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**HINDU LAW** ... 322
- Will of Mahomedan.** See **PROBATE** ... 391
- Will—Probate—Procedure—Succession Act (X  
of 1865), section 261.]** In cases where a will is  
contested, the Court is bound to consider, not  
only whether the alleged will was executed by  
the testator, but whether the will is valid or  
invalid, and whether probate of the will ought  
to be granted. Every consideration which ought  
to induce the Court to refuse probate of the  
will must be taken into account. **SARODA  
SOONDURI DOSSIA v. MUDDUN MOHUN SHAHA,  
24 W. R., 162 cited. AUNODA SUNDARI DABI  
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